The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction

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The ongoing debate over the intent of the framers of section one of the fourteenth amendment continues unabated. Typically, participants in the debate take one of two approaches. One group of commentators essentially ignores the legislative history of the fourteenth amendment. Focusing instead on what they see as the plain meaning of terms such as "equal protection," "privileges and immunities," and "due process," these commentators invariably conclude that the framers intentionally employed "majestic generalities," leaving courts free to change the contours of constitutional protections as conditions warrant.

The other group of commentators is more sophisticated. This group recognizes that the connotations of particular phrases might very well change over time; thus, they focus on mid-nineteenth century explanations of the language of section one. In their analysis of the framers' intent, some of these commentators draw on abolitionists theory or the ratification debates. More commonly, however, the focus is on statements made about section one in the floor debates over the fourteenth amendment, and the earlier discussions of the Civil Rights Bill of 1866.

While it is a marked advance over the "plain meaning" approach, this methodology has significant limitations. Focusing only on the statements dealing with equal protection, due process, and privileges and immunities tends to obscure this political context. Section one was only a part of a multifacetted constitutional amendment, which in turn was proposed in the context of a broader struggle over the post-Civil War Reconstruction of the defeated southern states. Understanding the terms of this struggle and the compromises which it engendered among competing factions is critical to any analysis of the section one framers' intent.

Other circumstances that surrounded the adoption of the fourteenth amendment also contribute to the difficulty in analyzing the section one floor debates. With the exception of a belated attempt to eliminate the privileges and immunities clause,[1] no alternative to the equal protection-privileges and immunities-due process formulation was presented in the full House or Senate during the discussions of the fourteenth amendment. Thus, it is often difficult to separate attacks on the form of section one from complaints about the general principle of protecting minority rights through a constitutional amendment. The problem is particularly acute because, in general, those who spoke against the equal protection-privilege and immunities-due process formulation had opposed every attempt to protect black rights which had been pre-

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1. *See infra* note 192 and accompanying text.

sented to the Thirty-ninth Congress.[2] These men could be expected to exaggerate both the potential effects of the amendment and any perceived flaws in its wording in order to sway uncertain votes. Conversely, in order to attract supporters, proponents of the three-pronged formulation may well have downplayed any uncertainties in language and minimized the impact of section one.

The foregoing is not meant to denigrate the importance of studying the floor debates on section one. Rather, it is simply meant to spotlight the need to supplement such a study with (1) an analysis of the manner in which the development of other sections of the fourteenth amendment interacted with that of section one, and (2) a comparison of section one's language with other rejected alternatives. This need can only be satisfied by focusing on the Joint Committee on Reconstruction (Joint Committee)—the body which generated the basic framework of the fourteenth amendment.

Unfortunately, the information available on the proceedings of the Joint Committee is relatively limited. Although the roll call votes on the various motions before the Committee are available, no record was made of the discussions which surrounded those motions. Nonetheless, by analyzing the voting patterns on issues affecting section one and by placing those patterns within the appropriate political context, one can gain some additional insight into the intent of the framers of the fourteenth amendment.

This article attempts such an analysis. As indispensable background, part I briefly summarizes the political situation that the first session of the Thirty-ninth Congress faced. Part II examines early congressional efforts to deal with issues that affected the shape of the fourteenth amendment. Part III traces the development of section one in the Joint Committee by analyzing voting patterns at each stage and by placing relevant changes in appropriate political context.

I. THE POLITICS OF RECONSTRUCTION[3]

To understand the forces which shaped section one of the fourteenth amendment, one must understand the nature of the Reconstruction debate. Essentially, the debate centered on the conditions under which the defeated southern states would be restored to equal status in the Union. Three distinct groups vied for control on each issue.

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2. There were a few relatively unimportant exceptions. Some mainstream Republicans expressed reservations about a precursor of section one but nonetheless ultimately voted for the Civil Rights Bill, the Freedmen's Bureau Bill, and the fourteenth amendment itself. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1063–64 (1866) [hereinafter cited as GLOBE] (remarks of Rep. Hale); *id.* at 1083–87 (remarks of Rep. Davis).

3. Historians have produced a number of insightful studies of the political conflicts surrounding the early Reconstruction era. Not surprisingly, these studies espouse different conclusions. Among the most prominent are H. BEALE, THE CRITICAL YEAR: A STUDY OF ANDREW JOHNSON AND RECONSTRUCTION (1930); M. BENEDICT, A COMPROMISE OF PRINCIPLE (1974); W. BROCK, AN AMERICAN CRISIS: CONGRESS AND RECONSTRUCTION 1865–1867 (1963); L. COX & J. COX, POLITICS, PRINCIPLE AND PREJUDICE 1865–1866 (1963); W. DUNNING, RECONSTRUCTION, POLITICAL AND ECONOMIC: 1865–1877 (1907); C. FAIRMAN, RECONSTRUCTION AND REUNION 1864–1868 (1971); E. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION (1960); K. STAMPP, THE ERA OF RECONSTRUCTION, 1865–1877 (1972).

Studies which focus on the fourteenth amendment include, H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT (1908); H. GRAHAM, EVERYMAN'S CONSTITUTION (1968); J. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT (1956), and J. TEN BROEK, EQUAL UNDER LAW (1965).

President Andrew Johnson and his allies formed one group. In Congress, these allies were primarily Democrats. The Democrats believed that the southern states should be immediately restored to full participation in the Union, with few if any limitations on the participation of former Confederates in government. Some Democrats, such as Reverdy Johnson, supported the thirteenth amendment; others, such as Andrew Rogers, voted against the anti-slavery amendment. Democrats, however, generally agreed that further measures to protect the rights of blacks were inappropriate.

A small group who might best be described as Johnson Republicans often supported the Democrats. Despite their party affiliation, Johnson Republicans supported conservative positions which often diverged sharply from those of the Republican mainstream. Some members of the group, such as Edgar A. Cowan of Pennsylvania, committed themselves to the Democratic program.[4] Others, such as Killian V. Whaley of West Virginia and James H. Lane of Kansas, were willing to support a more moderate Reconstruction program if the program did not place them in conflict with President Johnson; opposition from the President, however, would induce them to change their positions.[5]

The Democrats and their allies were opposed by the mainstream of the Republican party which itself was split into two major factions—Moderates and Radicals. The members of both major factions of the Republican party shared certain general goals which distinguished them from Democrats and Johnson Republicans. Neither faction believed that the states of the defeated Confederacy should be immediately restored to full participation in the Union. Instead, both Moderates and Radicals agreed that prior to restoration, some further federal protection for the rights of freed slaves was necessary. Both groups also believed that the position of Unionists in the southern states needed to be strengthened. Finally, for obvious reasons, both groups wished to enhance the fortunes of the Republican party.

Despite these similarities, the two major Republican factions differed sharply on policy prescriptions. One group—the Radicals—was willing to postpone indefinitely the readmission of the defeated southern states. Radicals argued that strong steps were necessary to ensure that the former leaders of the Confederacy would neither control the power structure of the southern states nor have a strong influence on national politics. To accomplish their goals, Radicals argued for stringent measures to disenfranchise former rebels and prohibit them from serving in public office; some Radicals—notably Thaddeus Stevens—also advocated confiscation of rebel property. In addition, Radicals pressed for strong guarantees of former slaves' rights, including the right to vote. Black suffrage was seen as important not only for its own sake, but also as a means to counterbalance the political power of former confederate sympathizers.

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4. *See* GLOBE, *supra* note 2, at 345 (by implication).

5. The most easily identified members of this group are those senators who initially voted to pass the Freedmen's Bureau Bill but who later voted to sustain Johnson's veto of the same bill, compare GLOBE, *supra* note 2, at 421 with *id.* at 943, and those senators and congressmen who initially voted in favor of the Civil Rights Bill but who later voted to sustain the presidential veto of that bill. *Compare* GLOBE, *supra* note 2, at 606-07 *with id.* at 1809; *compare* GLOBE, *supra* note 2, at 1367 *with id.* at 1861.

Moderates, by contrast, took a more conciliatory attitude toward the South. In general, members of this Republican faction were more anxious than the Radicals to restore the defeated confederate states to full partnership in the Union. Thus, Moderates proposed terms far less stringent than those advocated by Radicals. Moderates also disagreed with Radicals on the extent to which the federal government should protect black rights. In particular, the issue of black suffrage was a recurrent debate.

Although these differences derived in part from the groups' divergent notions of just treatment for both blacks and the defeated southern states, other forces also contributed to the difference in attitude of the Moderates and Radicals. On an ideological level, the concept of federalism was one overarching concern. The Union victory in the Civil War had destroyed the most extreme theories of state sovereignty. Moreover, during the war, the federal government had exercised a degree of authority unheard of during the Antebellum era. Nonetheless, the general ideology of federalism remained very much alive to challenge any expansion of peacetime national authority.[6]

Democrats and their allies, of course, constantly referred to concerns of federalism in their attacks on virtually all Reconstruction measures. Although more willing to extend the power of the federal government, mainstream Republicans also shared similar concerns.[7] In general, Moderates found considerations of federalism more compelling than did Radicals.[8] This difference of opinion emerged clearly in the debates over a precursor to the fourteenth amendment which would have granted Congress the power to protect certain classes of civil rights.[9]

The Radical-Moderate split was also generated at least in part by more narrowly focused political considerations. The most immediate problem was the political sentiment of the populace in the North. Suffrage was a key problem; the electorate generally seemed to oppose guaranteeing blacks the right to vote. Moderates took a practical approach and sought to retain support by moving relatively slowly on the issue of black rights. Radicals, by contrast, pressed for full equality notwithstanding the political dangers of such a position.

Moderates and Radicals were also concerned with long-range Republican fortunes in the South. Both groups realized that when the ex-confederate states were readmitted to the Union, the Republican grip on national power might depend on the Republican party's ability to elect representatives and senators in the South. By pursuing a conciliatory Reconstruction policy, Moderates hoped to build bridges to the still influential prewar southern leadership. Radicals, by contrast, placed their hopes in a new coalition between the small group of southern Unionists and the freed slaves who would be newly enfranchised.

Finally, the spectre of Andrew Johnson loomed over the Moderate-Radical

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6. *See, e.g.*, GLOBE, *supra*, note 2, at 1267–70 (remarks of Rep. Kerr in opposition to Civil Rights Bill); *id.* at 372–73 (remarks of Sen. Johnson in opposition to Freedmen's Bureau Bill).

7. For general discussions of the impact of federalism on the Thirty-ninth Congress, see, *e.g.*, H. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR ON THE CONSTITUTION 367–90, 394–96 *passim* (1973); Kelly, *Comment on Harold M. Hyman's Paper* in NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION 55–56 (H. Hyman ed. 1966). *Contra* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 622 (2d student ed. 1983).

8. *See* H. HYMAN, *supra* note 7, at 394–96.

9. *See infra* notes 44–58 and accompanying text.

rivalry. Both groups recognized that as President, Johnson was both a politically potent force and a potential major roadblock to any congressional Reconstruction program. Thus, both groups wooed him assiduously (as did the Democrats and their Republican allies). As Johnson drifted increasingly into the Democrats' camp, Moderates attempted to placate him by taking increasingly moderate positions in their proposals; Radicals, however, pressed for confrontations relatively early in the session. Ultimately, Republicans realized that Johnson was irrevocably lost as an ally and thus that he posed a major threat to Republican power. This realization forced Moderates and Radicals to compromise their differences and pass what is now the fourteenth amendment.

II. Early Congressional Action on Reconstruction Issues

Although contemporary legal commentators typically view sections one and five of the fourteenth amendment as "the" fourteenth amendment, the amendment is actually a conglomeration of four sections which deal with distinctly different issues and a fifth section which grants a general enforcement power to Congress. Section one establishes constitutional protection for certain rights. Section two changes the scheme for apportioning the House of Representatives. Section three seeks to limit the political influence of former confederate leaders. Section four deals with the debts of the federal and state governments, respectively. The entire amendment was linked to a bill which provided for the readmission of the southern states upon ratification of the constitutional change.

The idea of a conglomerate amendment did not emerge, however, until late March 1866. Prior to that time, Congress had treated different Reconstruction issues separately. Understanding the evolution of these early attempts to solve the Reconstruction problems is indispensable to an analysis of the fourteenth amendment itself.

A. *The Basic Problem of Reconstruction*

The central issue of the Reconstruction debate was the question of the conditions under which the southern states should be restored to the status of fully participating partners in the Union. For President Johnson, the answer to this question was relatively simple. Operating under a claim of executive authority as commander-in-chief, Johnson began appointing provisional governors for the various confederate states in May 1865. Under the authority of these governors, state constitutional conventions were called. Once these conventions voided the prewar secession ordinances, abolished slavery, and repudiated the rebel state debt, elections for state and national offices were held. In Johnson's mind, after the newly-elected legislatures had ratified the thirteenth amendment, the necessary steps were complete; the states were entitled to representation in Congress and the provisional governor could be retired. With the sole exception of Texas, this process was completed by the end of 1865 in all the states which had seceded from the Union.[10]

10. *See* E. McKitrick, *supra* note 3, at 89.

CHRONOLOGY OF CONGRESSIONAL RECONSTRUCTION

	December, 1865		January, 1866		February, 1866			March, 1866	
	Dec. 13	**Dec. 14**		**Jan. 30**		**Feb. 13**	**March 5**		
Readmission Generally	Joint Committee Established	Tennessee Representatives Granted Floor Privileges		Arkansas Representatives Denied Floor Privileges		Arkansas Representatives Denied Floor Privileges	Joint Committee Adopts Tennessee Readmission Resolution		
			Jan. 16	**Jan. 31**				**March 9**	
Appointment			Joint Committee Adopts Apportionment Amendment	Passes House				Defeated in Senate	
			Jan. 12	**Jan. 25**	**Feb. 5**	**Feb. 19**	**Feb. 20**		
Freedmen's Bureau Bill			Reported to Senate	Passes Senate	Passes House	Vetoed	Overrule Attempt Fails in Senate		
			Jan. 12		**Feb. 2**			**Mar. 9**	**Mar. 13**
Civil Rights Bill			Reported to Senate		Passes Senate			Recommitted to House	Amended Bill Passes House
			Jan. 16		**Feb. 10**		**Feb. 28**		
Bingham Amendment			Introduced in Joint Committee		Adopted by Joint Committee		Postponed Indefinitely by House		
Fourteenth Amendment									

ACTIONS DURING THE FIRST SESSION OF THE 38TH CONGRESS

March, 1866			April, 1866					May–July, 1866	
									July 21 Tennessee Readmitted; David Patterson Seated
March 15 Amended Bill Passes Senate	March 27 Stockton Unseated; Johnson Veto	April 6 Senate Overrides Veto	April 9 House Overrides Veto						
				April 21 Owen Plan Introduced in Joint Committee; Bingham Proposal Added	April 25 Bingham Proposal Removed	April 28 Black Suffrage Removed; Disenfranchisement Added; Bingham Substitute Adopted; Committee Adopts Plan	May 10 House Passes Amendment	June 6 Senate Passes Modified Amendment	June 11 House Concurs

The dominant Republicans in Congress took a quite different view. They believed that the Reconstruction process was not ending but was only beginning. When the Thirty-ninth Congress convened in December 1865, the southern representatives elected under the Johnson governments were excluded by the simple expedient of arranging not to have their names called on the roll by the Clerk of the House.[11] The Joint Committee on Reconstruction was established and charged with the duty of "inquiring into the condition of the States which formed the so-called Confederate States of America, and report whether they, or any of them, are entitled to be represented in either House of Congress."[12]

In late 1865 and early 1866, the Joint Committee became the primary battleground for the issue of restoration of representation. Some battles over the issue still occasionally erupted on the House floor, however. Prominent among these battles was the struggle over whether to grant the putative representatives from Tennessee and Arkansas the privileges of the House floor (a status to be distinguished from voting membership). Initially, a resolution was introduced which suggested that the House view the Tennessee elections as legitimate. Moderates joined with Radicals in a coalition which defeated this proposal.[13] Moderates joined with Democrats, however, to adopt a resolution which invited the Tennessee representatives to occupy seats on the House floor.[14] Similar resolutions relating to Arkansas representatives, however, failed.[15]

The Joint Committee confronted the representation issue more directly. Tennessee was the first major focus of attention. Many congressmen considered Tennessee's case unique. A number of factors help explain this attitude. First, Tennessee was clearly the former confererate state which had the strongest claim for immediate readmission. The state not only had a large reservoir of pro-Union sentiment, but also had been substantially under the control of Union armed forces for a significant period of time prior to the end of the Civil War. Second, Tennessee's status was of enormous symbolic importance; President Johnson was a native of Tennessee and had been military governor of the state prior to becoming Vice-President. Given these factors, the special attention given to Tennessee is not surprising.

The subcommittee on Tennessee reported to the full Joint Committee on February 15, 1866. The subcommittee's proposal essentially would have restored the state's congressional representation without further preconditions.[16] Radicals, however, gained enough Moderate support to narrowly defeat this proposal by referring it to a new subcommittee.[17] A modified Tennessee proposal was reported to the full Committee on February 19, 1866.[18] Radicals continually pressed for more stringent con-

11. For different explanations of the clerk's refusal to call the names of the southern representatives, compare B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 142 (1969) with L. COX AND J. COX, *supra* note 3, at 139–41.

12. GLOBE, *supra* note 2, at 24–30, 46–47.

13. *Id.* at 33.

14. *Id.*

15. *Id.* at 507–08, 811–12.

16. B. KENDRICK, *supra* note 11, at 63–64.

17. *Id.* at 67.

18. *Id.* at 68–69.

ditions; Conservatives and some Moderates resisted these efforts.[19] Ultimately, on March 5, 1866, the Committee adopted a proposal which would have restored Tennessee's representation on the condition that the state: "(a) agree to continue the disenfranchisement of certain classes of Confederate sympathizers, (b) agree never to assume or pay any debt incurred in aid of the Confederacy, and (c) never make compensation for freed slaves."[20] Because other events intervened, neither house of Congress acted on the proposal.

B. *The Problem of Representation*

One of the key issues in the Reconstruction process was determining the future basis of representation in the House. As already noted, all Republicans were concerned with the maintenance of their control over the national legislature. In the absence of additional protections, restoration of southern representation potentially threatened this control. Indeed, post-War southern legislative power was potentially greater than that which had existed in the Antebellum period. In the original Constitution each slave counted as only three-fifths of a person for representation purposes.[21] With the enactment of the thirteenth amendment, however, each freed slave would be counted as one full person. The representation granted to the southern states would accordingly be expanded.

The Thirty-ninth Congress could have directly handled this problem by requiring the southern states to enfranchise the freed slaves. Republicans could then have hoped to ally themselves with the newly enfranchised voters and win seats in the South. In early 1866, however, political support for black suffrage was insufficient to pass such a measure.

The remaining option to Republicans who were concerned with the southern states' increased representation was to reduce the representation of those states which did not enfranchise blacks. One proposed solution suggested that the basis of representation be changed from the number of people within each state to the number of legal voters within each state.[22] This proposal, however, suffered from a number of serious drawbacks. First, because women were generally not enfranchised, the change would have affected not only the balance of power between North and South, but also the balance of power among the various Union states as well; in particular, basing representation on the number of voters within each state favored the western states, which had a smaller percentage of women.[23] Second, some people feared that the proposal would encourage states to broaden suffrage unduly to include groups such as aliens and children.[24] Finally, some Republicans were disturbed by the possibility that some border states would be discouraged from disenfranchising rebel sympathizers.[25]

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19. *See id.* at 69–81.
20. *Id.* at 81.
21. *See* U.S. CONST. art. I, § 2, para. 3.
22. Thaddeus Stevens submitted such a proposal to the Joint Committee. *See* B. KENDRICK, *supra* note 11, at 41.
23. *See* GLOBE, *supra* note 2, at 357 (remarks of Rep. Conkling).
24. *See id.*
25. *See id.* at 535–36 (remarks of Rep. Benjamin).

These problems led the Joint Committee to propose a more narrow constitutional amendment—one which would have continued to base representation on population, but which provided that "whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation."[26] Since relatively few blacks lived in the North, the committee proposal was well suited to Republican purposes; assuming that the southern states did not enfranchise the freed slaves, the proposal would have reduced southern representation without altering the balance of power among the Union states. Nonetheless, the committee amendment was vulnerable to a number of criticisms. First, on its face the proposal was a crass, punitive measure designed to serve the narrow political ends of the Republican party.[27] Second, the proposed amendment implicitly conceded each state's right to exclude blacks from voting. This concession was anathema to some Radicals; they claimed that a government which did not allow black suffrage was not "republican in form" as required by article four, section four of the Constitution.[28]

Thus, when the committee proposal was introduced in the House on January 22, 1866, it was subjected to a hail of criticism. Radicals complained that the proposal legitimated restrictions on black suffrage;[29] western Republicans agitated for an amendment which would base representation on the number of voters;[30] Democrats and Johnson Republicans argued that the Constitution did not *need* to be amended.[31] Nonetheless, House Republicans eventually closed ranks behind the committee proposal with minor modifications. Perhaps spurred by Johnson's openly expressed distaste for any change in the formula for representation, Republicans overwhelmed the Democratic opposition, and on January 31, 1866, the necessary two-thirds majority passed the proposed constitutional amendment.[32]

In the Senate, however, proponents of the amendment faced an uphill struggle from the beginning. First, Democrats and Johnson Republicans who opposed any constitutional change were stronger in the Senate than in the House. Second, doctrinaire Radicals led by Charles Sumner conducted an unceasing attack on the committee proposal, arguing that it was an abandonment of fundamental principles.[33] After they failed to convince the Senate to adopt a direct black suffrage amendment,[34] Sumner and a number of his allies joined the Conservative opposition to the representation amendment. Thus, when the final vote was taken on March 9, 1866, the number of those who supported the proposed amendment fell far short of the two-thirds majority necessary for the amendment's passage.[35]

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26. B. KENDRICK, *supra* note 11, at 53.

27. *See* E. MCKITRICK, *supra* note 3, at 339.

28. *See* GLOBE, *supra* note 2, at 405 (remarks of Rep. Shellabarger); *id.* at 406–07 (remarks of Rep. Eliot).

29. *See id.*

30. *See id.* at 535 (remarks of Rep. Schenck).

31. *See id.* at 483–92 (remarks of Rep. Raymond); *id.* at 353–56 (remarks of Rep. Rogers).

32. *Id.* at 538. As initially proposed, the committee amendment not only changed the basis of representation but also the method of apportioning taxation. The latter provision was omitted, however, in the version adopted by the House.

33. *See* GLOBE, *supra* note 2, at 1224–32.

34. *Id.* at 1284, 1287, 1288.

35. *Id.* at 1289.

C. *The Issue of Black Rights*

In the first session of the Thirty-ninth Congress, proposals to protect the rights of the freed slaves were introduced in a wide variety of contexts. The most common issue presented was black suffrage. General measures on this point were introduced in the context of the representation amendment debate. Moreover, specific requirements which related to black suffrage were proposed for the District of Columbia, Tennessee, Nebraska, and Colorado. These proposals were generally rejected.[36]

The lack of support for black suffrage, however, did not reflect a general insensitivity to the problems of the newly freed slaves. In the early days of its assembly, the Thirty-ninth Congress considered a number of proposals to protect blacks. Three proposals stand out as critical to understanding the background of the fourteenth amendment.

1. *The Freedmen's Bureau Bill*

The Bureau of Freedmen, Refugees and Abandoned Land initially had been created in March 1865. Vested with "control of all subjects relating to refugees and freedmen in the rebel states," the Bureau was to disband one year after hostilities terminated. On January 12, 1866, however, the Senate Judiciary Committee reported a bill to extend indefinitely the life of the Bureau. In addition, the bill expanded the jurisdiction of the Bureau by allowing it to protect freedmen throughout the country rather than only in the erstwhile confederate states. Further, the bill authorized the President to set aside large tracts of land in Florida, Mississippi, and Arkansas for the use of freedmen and "loyal refugees." Finally, the bill directed the Bureau's commissioner to parcel out the land in forty-acre plots to be rented and then purchased by those whom the agency was assigned to protect.

Democrats attacked the constitutionality of the proposed Senate bill. They argued that Congress lacked the authority to maintain the Bureau, particularly the authority to expand the Bureau's jurisdiction.[37] Republicans, however, viewed the bill as a reasonable extension of the extraordinary war powers under which Civil War measures had been justified.[38] The measure passed the Senate without difficulty on January 25, 1866,[39] and passed the House on February 6, 1866.[40] Even some Republicans who normally supported Johnson voted in favor of the bill.

The Freedmen's Bureau Bill was widely perceived as a moderate Reconstruction measure.[41] Nonetheless, President Johnson vetoed the bill on February 19, 1866.

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36. *See id.* at 1284, 1287, 1288 (black suffrage amendment); *id.* at 4000 (Tennessee); *id.* at 2373 (Colorado); *id.* at 4276 (Nebraska); B. KENDRICK, *supra* note 11, at 70.

Two exceptions to this general pattern developed. First, on January 18, 1866, the House passed a bill providing for black suffrage in the District of Columbia. GLOBE, *supra* note 2, at 311. This bill, however, never reached the Senate floor. The House also passed a resolution providing that no territory would be admitted to the Union unless the proposed state constitution provided for black suffrage. *Id.* at 2429.

37. *See* GLOBE, *supra* note 2, at 372–73 (remarks of Sen. Johnson); *id.* at 623 (remarks of Rep. Kerr).

38. *See id.* at 365 (remarks of Sen. Fessenden).

39. *Id.* at 421.

40. *Id.* at 688.

41. *See* M. BENEDICT, *supra* note 3, at 149–50; L. COX & J. COX, *supra* note 3, at 177.

Moreover, he couched his veto message in strong language; he not only argued that such a measure was generally beyond the power of Congress, but also suggested that the bill was invalid because representatives of the southern states had not been allowed to vote on its passage.[42] Thus, the President essentially challenged the entire principle of congressional control over Reconstruction.

Congress failed to override Johnson's veto. In the Senate, the vote to override the veto was thirty to eighteen—two votes short of the needed two-thirds majority.[43] The Thirty-ninth Congress' first effort to protect the civil rights of blacks thus ended in failure.

2. *The Civil Rights Bill*

The Civil Rights Bill was reported from the Senate Judiciary Committee the same day as the Freedmen's Bureau Bill. As originally reported, the Civil Rights Bill provided that "there shall be no discrimination in Civil Rights or Immunities . . . on account of race, color or previous condition of slavery."[44] The bill enumerated certain rights which were specifically protected. The Senate considered the Civil Rights Bill soon after initial proceedings on the Freedmen's Bureau Bill had been completed. In the Senate, the debate over the two bills took much the same course; the major difference in the arguments was in the sources of constitutional authority cited by proponents of the two bills. The Freedmen's Bureau extension had been justified on the basis of congressional war powers. In contrast, section two of the thirteenth amendment was the underpinning of the proposed Civil Rights Bill.[45] Democrats attacked the Civil Rights Bill as unconstitutional.[46] Once again, however, many Johnson Republicans joined the party mainstream and voted with Republicans for the bill's passage when the final vote was taken on February 2, 1866.[47]

The Civil Rights Bill faced a much tougher struggle in the House—in part, perhaps, because the House did not take up the bill until after the Freedmen's Bureau veto. Democrats and some Republicans voiced two concerns: First, they argued that the bill was outside the scope of congressional authority,[48] and second, they believed that the term "Civil Rights and Immunities" might be interpreted too broadly.[49] On March 9, 1866, two key votes were taken on motions to recommit the bill to the House Judiciary Committee. A group of Moderate and Conservative Republicans attempted to attach limiting instructions to the recommittal. Their motion was defeated by a coalition of Radical Republicans who sought to preserve the bill intact and Democrats who wished to defeat the entire package.[50] On a motion to recommit without instructions, however, more conservative Moderate Republicans joined with Democrats to defeat the Radicals and force recommittal.[51]

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42. *See* M. BENEDICT, *supra* note 3, at 155–56.
43. GLOBE, *supra* note 2, at 943.
44. *Id.* at 474.
45. *See id.* at 474 (remarks of Sen. Trumbull); *id.* at 602–03 (remarks of Sen. Lane).
46. *See id.* at 504–06 (remarks of Sen. Johnson); *id.* at 523–25 (remarks of Sen. Davis).
47. *Id.* at 606–07.
48. *See, e.g., id.* at 1120–23 (remarks of Rep. Rogers); *id.* at 1266–67 (remarks of Rep. Raymond).
49. *See, e.g., id.* at 1270–71 (remarks of Rep. Kerr); *id.* at 1291 (remarks of Rep. Bingham).
50. *Id.* at 1296.
51. *Id.*

House Republicans, however, quickly resolved their differences over the Civil Rights Bill. On March 13, 1866, the Judiciary Committee once again reported the bill. Only two changes were made. The most important was the elimination of the general reference to "Civil Rights and Immunities" which left only the specific list of protected rights. To ensure quick resolution of any constitutional issues, the revised bill also included a provision specifically providing for judicial review by the Supreme Court.[52] With these amendments the bill easily passed; only a small handful of Republicans joined the Democrats in opposition.[53] The Senate accepted the House amendments, and the Civil Rights Bill was sent to the President.

Like the Freedmen's Bureau Bill, the Civil Rights Bill was generally perceived as a Moderate measure.[54] At first it appeared that Johnson might be willing to sign the bill. As a veto became increasingly certain, however, Senate Republicans moved to avoid a second defeat. The Republican manuevering centered on the unseating of John P. Stockton. Senator Stockton was a conservative Democrat who had been selected by a somewhat irregular method.[55] At first, he had been provisionally seated. Later, the Senate Committee investigated his credentials and recommended that he be permanently seated. Ordinarily this would have more or less ended the matter; however, the Republican leadership knew that an attempt to override the expected Johnson veto of the Civil Rights Bill might depend on a single vote. Accordingly, on a roll call marred by some questionable parliamentary maneuvering,[56] a coalition of Moderates and Radicals succeeded by a one-vote margin in unseating Stockton.[57]

As feared, Johnson vetoed the Civil Rights Bill on March 27, 1866. Furthermore, his veto message left little room for compromise. Rather than simply attacking the specifics of the bill, the message in broad terms denied congressional authority to protect the civil rights of freedmen. In both the Senate and the House, Republicans closed ranks to oppose the veto. Both houses obtained the two-thirds majority necessary to override the veto,[58] and the Civil Rights Bill became law on April 6, 1866.

3. *The Bingham Amendment*

In the midst of the congressional proceedings on the Civil Rights Bill, the Joint Committee reported a proposed constitutional amendment which reached the House floor in February 1866. The proposed amendment provided no new guarantees; instead, the amendment simply granted Congress authority to "make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states; and to all persons in the several States equal protection in the rights of life, liberty and property."[59] The amendment was

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52. *See id.* at 1367.

53. *Id.*

54. *See* M. BENEDICT, *supra* note 3, at 148–49, 164–65.

55. For a more extensive explanation of the Stockton affair, see E. MCKITRICK, *supra* note 3, at 319–23.

56. Lot Morrill of Maine broke a pair with William Wright of New Jersey in order to cast a crucial vote against seating Stockton. Stockton himself then voted in his own favor. GLOBE, *supra* note 2, at 1601–02.

57. *Id.* at 1677.

58. *Id.* at 1809, 1861.

59. *See* B. KENDRICK, *supra* note 11, at 61.

primarily the handiwork of John Bingham—one of the few mainstream Republicans who consistently argued that neither the original Constitution nor the thirteenth amendment granted Congress the authority to protect the civil rights of blacks.[60]

The first signs of difficulty for the Bingham proposal appeared in the deliberations of the Joint Committee. Two of the more conservative Moderate Republicans joined with the Democrats in opposing the amendment.[61] On the House floor, Bingham's primary supporters were Radicals.[62] Radicals argued that the amendment would not only reinforce the power of Congress to protect the rights of the freed slaves, but also would grant authority for federal protection of white Unionists in the South—an authority which could not plausibly be inferred from the thirteenth amendment.[63] As expected, Democrats attacked the proposal.[64] On this occasion, however, the Democrats were not alone in their criticisms; a number of mainstream Republicans voiced similar concerns.[65] Finally, the Radical Hotchkiss pointed out that if the Republicans were voted out of office, their incumbent opponents might use the powers granted by the amendment to achieve undesirable goals.[66]

Because criticisms came from the Republican as well as the Democratic side of the aisle, it became clear that the Bingham proposal could not obtain the two-thirds majority it needed to pass. In order to avoid outright defeat, Bingham joined in voting to postpone final consideration of his proposal on February 20, 1866.[67]

D. *The Early Actions of the Thirty-ninth Congress—An Evaluation*

The course of events prior to 1866 reflects a number of important features of the political atmosphere surrounding the Thirty-ninth Congress. First, the actions of the Republicans prior to April 1866 clearly demonstrate that no Radical civil rights proposal could possibly have obtained the requisite majority during the first session of the Thirty-ninth Congress. Of the three general civil rights initiatives presented in the early stages of the session, two—the Freedmen's Bureau Bill and the congressional power amendment—had failed to become law because of insufficient support from the more conservative Republicans. The third—the Civil Rights Bill—had failed to obtain even a simple majority in the House until modified to meet

60. *See* GLOBE, *supra* note 2, at 1290–93.

61. *See* B. KENDRICK, *supra* note 11, at 61. The two Moderate Republican dissenters were Ira Harris and Roscoe Conkling.

62. *See* GLOBE, *supra* note 2, at 1057–62 (remarks of Rep. Kelly); *id.* at 1054–57 (remarks of Rep. Higby).

63. *See id.* at 1065 (remarks of Rep. Bingham).

64. *See id.* at 1057 (remarks of Rep. Randall).

65. The primary argument advanced by the opposition was delivered by Robert Hale of New York. *Id.* at 1054–56. Ordinarily, obtaining the support of a man such as Hale would not have been crucial to the success of the proposed amendment. While no amendment could pass without the solid support of mainstream Republicans, experience with the apportionment proposal had demonstrated that the necessary majority could be obtained without the aid of Johnson Republicans. While Hale supported mainstream Republicans on some key issues—notably the override of Johnson's Civil Rights Bill veto, *see id.* at 1861—Hale had left the party mainstream to join with Democrats and Johnson Republicans on other occasions. *See, e.g., id.* at 538, 950. Thus, Hale's opposition by itself was not necessarily fatal to the prospects of the Bingham amendment. In this case, however, Hale's objections were also shared by a substantial number of the more conservative mainstream Republicans. *See id.* at 1095 (remarks of Rep. Conkling) (by implication); *id.* at 1083–87 (remarks of Rep. Davis).

66. *Id.* at 1095.

67. *Id.*

Moderate objections. Admittedly, the combative Johnson veto of the Civil Rights Bill was a political shock; but any suggestion that the veto alone was enough to jolt Congress from a fairly conservative Moderate path to thoroughgoing Radicalism seems farfetched.

The sequence of events also suggests that the passage of a constitutional amendment guaranteeing civil rights was not a high priority among mainstream Republicans. Protecting the rights of the freed slaves was plainly a central feature of the Republican Reconstruction program;[68] the preferred method of protection, however, was the passage of statutes. Both the Freedmen's Bureau Bill and the Civil Rights Bill passed each house of Congress by a comfortable margin; by contrast, while both the Judiciary Committee and the Joint Committee on Reconstruction were presented with proposals to constitutionally prohibit racial discrimination, neither committee reported an independent amendment with that effect. Further, when the Joint Committee reported a proposal to expand the constitutional authority of Congress to protect civil rights, opposition in the House prevented the measure from even coming to a vote.

The early actions of the Thirty-ninth Congress also reflected the substantial influence of both the theory of federalism and political expediency on the approach of the Moderates. Federalism concerns were clearly evident in their approach to the proposed federal power amendment. Most Moderates favored the Civil Rights Bill as a matter of policy; at the same time, however, a number of them entertained serious doubts regarding the power of Congress to pass such a measure.[69] Nonetheless, even after the constitutional objections to the Civil Rights Bill had been fully aired in the Senate, opposition of the more conservative Moderates forced postponement of the Bingham amendment, which would have clearly provided Congress with the necessary authority. The reason was clear—the fear of centralization outweighed the urgency of ensuring the protection of the rights of the freed slaves.

The influence of purely political factors emerged clearly in the voting pattern on the Civil Rights Bill. Initially, constitutional concerns led a number of Moderates to join with Democrats in forcing the bill to be recommitted to the Judiciary Committee. With the defeat of the apportionment amendment, however, Republicans came under intense pressure to do *something* with respect to Reconstruction.[70] Thus, four days later most Moderates (Bingham excepted) voted to pass a slightly modified Civil Rights Bill, leaving the constitutional issue to the Supreme Court.

The actions of House Republicans on the Bingham amendment and the Civil Rights Bill thus reflect the complex interaction among the various considerations which shaped Republican Reconstruction policy. The remainder of this article will examine the effect of this interaction on the ultimate shape of section one of the fourteenth amendment.

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68. Indeed, some commentators view the question of racial discrimination as the single most important issue of the Reconstruction era. *See, e.g.*, L. Cox & J. Cox, *supra* note 3, at 195–232.

69. *See, e.g.*, GLOBE, *supra* note 2, at 1265 (remarks of Rep. Davis); *id.* at app. 156–69 (remarks of Rep. Delano).

70. M. BENEDICT, *supra* note 3, at 162

III. The Drafting of the Fourteenth Amendment

A. *The Political Problem*

The Republican party faced a major political crisis in early April 1866. The terms of Johnson's veto of the Civil Rights Bill had irrevocably alienated him from the Party; thus, it seemed highly likely that in the upcoming elections of 1866, the President would lead a movement to end the Republicans' domination of Congress. Reconstruction would clearly be the main issue in the election. With respect to Reconstruction, Johnson had a clear policy: rapid restoration of the defeated states with few, if any, new constraints.

The Republicans, by contrast, had yet to unite around a firm alternative. No single, comprehensive program had emerged from Congress. Moreover, most of the piecemeal attempts to address specific Reconstruction problems—the Freedmen's Bureau Bill, the apportionment amendment, and the Bingham amendment—had fallen victim to the combination of intraparty strife and Democratic opposition. Although the Civil Rights Bill passed despite Johnson's veto, the bill, standing alone, was hardly a platform on which an election could be contested. In short, mainstream Republicans urgently needed to reach a consensus on a comprehensive Reconstruction program which could be presented as an alternative to Johnson's plan.[71]

B. *The Owen Plan*

Against this background Robert Dale Owen presented his Reconstruction plan to various members of the Joint Committee in mid-April 1866. The plan began with a five-part constitutional amendment. The first section dealt with guarantees of civil rights for blacks. The second section required states to grant black suffrage no later than July 4, 1876. The third section provided that until 1876, if a state excluded a portion of its population from the right to vote based upon race, that portion of the population would not be counted in determining the number of representatives to which the state was entitled in the national legislature. The fourth section required the repudiation of debts incurred to support the confederate war effort, and the fifth section gave Congress the power to enforce all four of the preceding sections.

The Owen plan also provided specific conditions under which the ex-confederate states could regain their representation in Congress. This representation would be regained if and only if (a) the proposed amendment had become part of the Constitution; (b) the relevant state had modified its laws to conform with the amendment; and (c) the elected representatives had taken the appropriate oath of office. In any event, however, certain classes of ex-confederate leaders were to be barred from becoming members of Congress until 1876.[72]

As a political statement, the structure of the Owen plan fit the needs of the Republican party perfectly. First, the plan spelled out in some detail the changes that the Party demanded in both the national and southern political structure. Second, the

71. *See* B. Kendrick, *supra* note 11, at 292–93; E. McKitrick, *supra* note 3, at 344–45.
72. *See* B. Kendrick, *supra* note 11, at 83–85.

statutory portion of the plan explicitly stated that when the ex-confederate states agreed to make these changes, readmission would immediately follow. Finally, the amendment format (if not its content) was peculiarly suited to respond to widely shared attitudes of the northern populace. In simple terms, most northerners in 1866 desired some overt confession of southern wrongdoing as a precondition for restoration of the full privileges of citizenship and statehood.[73] No such confession had been forthcoming prior to 1866. By requiring states to ratify the amendment in order to regain representation in Congress, the Owen plan clearly required such a gesture.

Further, the Owen plan provided a potential basis for compromise between Moderates and Radicals. The plan contained something for everyone. It began with the one principle upon which the entire Republican party could agree—blacks should have at least some of the legal rights of citizens. While the proposed protection was in broader terms than terms preferred by Moderates, immediate black suffrage was not included. At the same time, Radicals were no doubt pleased by the provision which ensured that blacks would eventually be enfranchised. Both groups agreed on the need to ensure that Congress would not immediately be innundated by the increase in southern representation generated by the freeing of the slaves. Radicals and Moderates also agreed that the provision in the proposal which required the repudiation of the confederate war debt was necessary. Perhaps most significant to Moderates, the proposal set relatively mild, concrete standards for the restoration of the southern states, and did not prevent large classes of southern leaders from participating in state government. The temporary exclusion of many ex-Confederates from service in Congress, by contrast, reflected Radical thinking. Finally, and perhaps most important in terms of reaching a compromise, the various parts of the Owen plan were seen as inextricably intertwined; no faction could attack the parts of the plan which it believed were distasteful without risking loss of those parts which it found to be good policy. Thus, on its face, the Owen plan seemed to provide a workable basis for compromise.

Despite the apparent promise of the Owen proposal, neither the Joint Committee nor the full Congress adopted the proposal intact. The basic five-part framework of the proposed amendment was retained, but substantively, a number of the provisions were altered significantly. The import of some changes was obvious; the elimination of all reference to black suffrage was plainly an effort to placate Moderates, while the addition of a provision which disenfranchised ex-Confederates was clearly a Radical initiative. By contrast, the meaning of the change in section one's language is, on its face, far less clear. Both the Owen proposal and the ultimate adopted language are couched in quite general terms.

The best source of illumination on this point would be a record of the Joint Committee's actual discussions. Unfortunately, no such record exists. The votes of each committee member on the various proposals brought before the Committee were, however, recorded in a journal.[74] By tracing the patterns of key votes dealing

73. *See* REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39th Cong., 1st Sess. XVI–XVIII (1866); W. BROCK, *supra* note 3; E. MCKITRICK, *supra* note 3, at 21–41.

74. B. KENDRICK, *supra* note 11, at 37–129; *see infra* Tables 1–8.

with section one, and by placing those patterns in their political context, one can gain some insight into whether the ultimate change in language reflected Radical or Moderate thinking.

Of course, before any meaningful voting analysis can be made, one must first understand the political proclivities of the various voters. The next subpart briefly describes the political views of each of the nine representatives and six senators who served on the Joint Committee.

C. *The Views Held by the Members of the Joint Committee on Reconstruction*[75]

1. *The Representatives*

a. *John A. Bingham*

Any discussion of the men who drafted section one of the fourteenth amendment must begin with John Bingham, a Republican from Ohio. Throughout the deliberations of the Joint Committee, Bingham was the champion of the "privileges and immunities–due process–equal protection" formulation which ultimately emerged in section one. Thus, an understanding of Bingham's views is critical to properly analyze section one.

Bingham was one of the leading Moderates of the Thirty-ninth Congress. He consistently opposed overly stringent conditions for restoration of the defeated south-

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75. In classifying representatives and senators as "Radical," "Moderate," or "Conservative," one must always be cognizant of a number of problems. First, a representative or senator might be a Radical for some purposes and a Moderate or even a Conservative for others. Although the issues which divided the various factions of the Thirty-ninth Congress were interrelated, they were nonetheless separable. Thus, a congressman could have favored stringent measures to ensure the disenfranchisement of former rebels, but also could have opposed strong federal action to secure the rights of blacks.

Despite this problem, for purposes of evaluating section one, the voting records of committee members on issues other than black rights should be examined because section one cannot be viewed in isolation; it was part of an elaborate political compromise whose various elements implicated virtually every key issue of Reconstruction political life. Thus, one must analyze the positions of committee members on all Reconstruction issues in order to evaluate these members' positions on section one.

Second, the first session of the Thirty-ninth Congress convened at a rather special moment in history. The Civil War had ended. The pressures of war which might have inclined some people to lean toward Radicalism therefore had abated somewhat. At the same time, the events which polarized the nation during the presidency of Andrew Johnson were just beginning to take form. Thus, the pressures engendered by those events, which pushed various representatives and senators toward Radicalism in late 1866 and 1867, were not present. For purposes of evaluating the origins of section one of the fourteenth amendment, examination of political attitudes before and after the first session of the Thirty-ninth Congress are therefore of only limited utility. *See generally* M. BENEDICT, *supra* note 3, at 339–95 (reflecting changing positions of members of Congress); D. DONALD, THE POLITICS OF RECONSTRUCTION 89–99 (1965); J. McCarthy, Reconstruction Legislation and Voting Alignments in the House of Representatives 1863–1869 (1970) (unpublished Ph.D. dissertation on file, Yale University). Instead, the primary focus must be on the attitudes of the members at the time of that particular session of Congress.

Finally, political alignments could and did change even during the course of the single session of Congress at issue. The signs of the intransigence of Johnson might have hardened some committee members during the course of the session. At the very least, the conflict with Johnson increased pressure for party unity among Republicans. Moreover, attitudes during the session might have changed because of the testimony presented to the Joint Committee on the condition of the former confederate states. Given that this testimony painted a generally unfavorable picture of conditions in the South, one might expect the attitudes of some committee members to harden during the course of the session.

These caveats aside, however, a close study of the voting patterns of various Joint Committee members provides a basis for forming reasonably reliable judgments regarding the Radicalism of these members. For other descriptions of the Joint Committee members, see W. BROCK, *supra* note 3, at 124–35; B. KENDRICK, *supra* note 11, at 155–97. For more general voting studies, see M. BENEDICT, *supra* note 3; J. McCarthy, *supra*.

ern states,[76] and generally voted against proposals to introduce black suffrage.[77] But while Bingham's relative conservatism is often emphasized, it should not be overstated. For example, while joining in the successful move to grant the privileges of the House floor to Tennessee representatives,[78] he opposed a similar grant of privileges to the representatives from Arkansas,[79] as well as a form of the Tennessee resolution which suggested that no further Reconstruction measures were necessary in Tennessee.[80] Bingham's position on the bill to provide black suffrage in the District of Columbia was also in contrast to that of more conservative Moderates; Bingham spoke strongly in favor of black suffrage in the District of Columbia and voted against measures designed to limit the impact of black suffrage.[81]

Bingham was a man of deeply held (if not always clearly enunciated) views on constitutional law. His constitutional scruples in large measure led him to be one of the few Republicans who ultimately opposed passage of the Civil Rights Bill.[82] He saw the lack of congressional authority to enforce the Bill of Rights against the states as the great flaw in the Antebellum constitutional scheme, and his proposals which ultimately became section one were designed to remedy that flaw.[83]

b. *Thaddeus Stevens*

Thaddeus Stevens, a Republican from Pennsylvania, was the most famous Radical in the House of Representatives. He favored treating the southern states as conquered territories; in addition he advocated breaking the power of the landed aristocracy of the Confederacy by not only reorganizing the political systems of the southern states, but also by confiscating and redistributing property.[84] Notwithstanding his extreme views, however, Stevens was also acutely aware of the need for party unity; he clearly recognized that only a unified Republican party could resist pressure from the Democrats and Andrew Johnson and produce a Reconstruction program which contained any vestiges of Radicalism. Thus, while generally intransigent on matters of black suffrage,[85] Stevens was willing at times to vote with the Moderates on other issues when it became clear that the Radical position was doomed to defeat. This practical attitude was clearly evident in his approach to the readmission of Tennessee. In the Joint Committee he consistently voted to impose stringent requirements for readmission. However, early in the session he abandoned the extreme Radicals in the full House and voted to grant the putative Tennessee representatives the privileges of the floor.[86] Similarly, after the fourteenth amendment was proposed and ratified by Tennessee, Stevens opposed a readmission resolution through a series

76. *See infra* Table 5.
77. *See infra* Table 1.
78. GLOBE, *supra* note 2, at 33.
79. *Id.* at 507, 812.
80. *Id.* at 33.
81. *Id.* at 222, 310, 311.
82. *Id.* at 1290–93, 1296.
83. *Id.* at 1292.
84. *See* F. BRODIE, THADDEUS STEVENS SCOURGE OF THE SOUTH 232–33 (1959).
85. *See infra* Table 3.
86. GLOBE, *supra* note 2, at 33.

of dilatory motions. Once it became clear that the resolution commanded a majority, however, Stevens joined the Moderate-Conservative coalition and ultimately voted for readmission.[87]

This same concern for the practicalities of politics is reflected in Stevens' more general voting pattern in the Joint Committee. He seems to have been acutely aware of the need to produce some kind of congressional Reconstruction program, and he was willing to compromise with the Moderates to generate such a program. Perhaps the best reflection of Stevens' sense of the situation's practicalities is that he was more likely to vote with the Moderate leader Bingham on Joint Committee issues than with such Radical stalwarts as Boutwell and Howard.

c. *George S. Boutwell*

George S. Boutwell, a Republican from Massachusetts, was, like Stevens, a committed Radical. Unlike Stevens, however, Boutwell was generally unwilling to compromise in the face of political reality. Indeed, Boutwell is described by one authority as "the coldest, most calculating and yet unreasoning fanatic on the committee."[88] Boutwell, for example, was unwilling to allow the Tennessee representatives the privileges of the House floor.[89] He was one of only twelve Republican representatives who ultimately voted not to restore that state's representation.[90]

d. *Roscoe Conkling*

In connection with section one of the fourteenth amendment, the primary fame of Roscoe Conkling, a Republican from New York, is not derived from his role in the drafting process. Instead he is chiefly remembered as the man who argued *San Mateo County v. Southern Pacific Railroad*[91]—the case in which the Supreme Court held that the protection of section one applied to corporations as well as to natural persons. Nonetheless, Conkling was also an important figure at the time the amendment was drafted.

Historians disagree on whether Conkling should be classified as a Radical, a Moderate, or even a Conservative.[92] This difficulty may stem in part from the fact that his voting pattern exhibits something of a split personality. On matters concerning black rights he was quite conservative in comparison to his Republican colleagues—perhaps the most conservative member of the House Republican delegation to the Joint Committee. Not only did he generally oppose measures for black suffrage[93] and join Conservative efforts to limit the Civil Rights Bill,[94] he also joined

87. *Id.* at 3980.

88. B. KENDRICK, *supra* note 11, at 187.

89. GLOBE, *supra* note 2, at 33.

90. *Id.* at 3980.

91. 116 U.S. 138 (1885).

92. *Compare* M. BENEDICT, *supra* note 3, at 28 (Conkling described as "conservative") *with* F. BRODIE, *supra* note 84, at 242–43 (describing Conkling as a man who "could . . . be counted on to follow Stevens' lead and generally obey his orders").

93. *See infra* Table 3.

94. GLOBE, *supra* note 2, at 1296.

conservative Republicans in voting to postpone the District of Columbia Black Suffrage Bill.[95] This same conservatism is also evident in his voting pattern in the Joint Committee itself; Conkling showed great skepticism for the idea of providing any constitutional protection for black rights.[96]

By contrast, Conkling was quite radical on other Reconstruction issues. In the Joint Committee, for example, he supported broad disenfranchisement and the disqualification of former rebels.[97] On the House floor itself, Conkling supported the Radicals on some (although not all) of the preliminary motions relating to the restoration of the representation of Tennessee. Thus, the classification of Conkling as a "Radical," "Moderate," or "Conservative" depends largely on the particular issue involved.

e. *Elihu B. Washburne*

Like Conkling, considerable controversy surrounds the proper classification of Elihu B. Washburne, a Republican from Illinois.[98] Washburne's classification is more difficult because he voted less frequently than some of his House colleagues. For example, he did not participate in the final struggle over the restoration of Tennessee. A close examination of his record on the occasions when he did vote, however, reveals that Washburne had, at least in the first session of the Thirty-ninth Congress, strong Radical tendencies.

Washburne consistently supported black suffrage bills.[99] Indeed, in the Joint Committee he supported enfranchising blacks through a constitutional amendment even after the idea had been abandoned by Stevens and Boutwell.[100] Washburne was equally Radical on other issues, as evidenced by his support in the Joint Committee for broad disenfranchisement and disqualification of ex-rebels[101] and his opposition to the Moderate motion to recommit the Civil Rights Bill.[102] He did, however, join with Stevens in abandoning the extreme Radicals and voted at the beginning of the session to give the representatives from Tennessee the privileges of the House floor.[103]

f. *Justin S. Morrill*

In many respects, the voting pattern of Justin S. Morrill, a Republican from Vermont, resembles that of Elihu Washburne. Like Washburne, Morrill consistently supported black suffrage,[104] and he consistently supported broad disenfranchisement

95. *Id.* at 310; *see also id.* at 311 (vote to limit suffrage).
96. *See* B. KENDRICK, *supra* note 11, at 57, 61, 62.
97. *See infra* Table 5.
98. *Compare* M. BENEDICT *supra* note 3, at 31 *with* W. BROCK, *supra* note 3, at 129.
99. *See infra* Table 3.
100. B. KENDRICK, *supra* note 11, at 101.
101. *See infra* Table 5.
102. GLOBE, *supra* note 2, at 1296.
103. *Id.* at 33.
104. *See infra* Table 3.

and disqualification of ex-rebels.[105] Other positions taken by Morrill, however, indicate a more Moderate tone in his politics. He voted with Moderates to recommit the Civil Rights Bill,[106] although he opposed the move to attach limiting instructions to the recommittal motion.[107] Moreover, while Morrill initially supported Radicals on the preliminary motions dealing with the readmission of Tennessee, he switched sides in later stages, apparently mollified by a small change in the wording of the resolution.[108] Thus, while it would certainly be appropriate to regard Morrill as leaning toward Radicalism, he was probably less radical than Washburne, and certainly not as radical as either Stevens or Boutwell.

g. *Henry P. Blow*

Henry P. Blow, a Republican from Missouri, is generally viewed as the most conservative Republican on the House delegation to the Joint Committee. He consistently opposed black suffrage[109] as well as disenfranchisement and disqualification measures.[110] Even prior to the consideration of the fourteenth amendment, Blow joined in the move to have Tennessee readmitted essentially without conditions.[111] Finally, he was the only member of the Republican House delegation to the Joint Committee who supported the initial motion to grant privileges of the House floor to those elected from Tennessee on the basis of a resolution which suggested that the Tennessee representatives had been appropriately elected.[112]

h. *Henry Grider and Andrew J. Rogers*

The two Democrats of the House delegation were Henry Grider of Kentucky and Andrew J. Rogers of New Jersey. Both men were thoroughgoing Conservatives. While Grider was rather nondescript, Rogers is noteworthy for his opposition to the thirteenth amendment and for the virulence of the anti-black feeling expressed in his House floor speeches.

2. *The Senators*

a. *William P. Fessenden*

William P. Fessenden, a Moderate from Maine, was the senior Senate Republican on the Joint Committee and accordingly served as chairman of the Committee. As one of the most influential members of the Senate, he was chosen over Charles Sumner of Massachusetts—the symbol of extreme Radicalism in the Senate and Fessenden's arch political enemy—to lead the Republican delegation. While perhaps

105. *See infra* Table 5.
106. GLOBE, *supra* note 2, at 1296.
107. *Id.*
108. *Id.* at 3948, 3949, 3975, 3976.
109. *See infra* Table 3.
110. *See infra* Table 5.
111. B. KENDRICK, *supra* note 11, at 67.
112. GLOBE, *supra* note 2, at 33.

Fessenden is most famous for his vote against conviction in the impeachment trial of Andrew Johnson in 1867, Fessenden's voting record in the full Senate reflects a Moderate approach.[113]

Fessenden's political approach is exemplified by his position on the two major credentials battles—the Stockton affair and the Patterson controversy—which had Reconstruction overtones. The circumstances surrounding John Stockton's case have already been described.[114] Fessenden helped lead the Radical-Moderate coalition which succeeded in unseating Stockton.

David Patterson of Tennessee presented a different problem. Selected to serve by the Tennessee legislature after the state had been readmitted late in the session, Patterson unquestionably had been a loyal Unionist during the Civil War. Nonetheless, unusual circumstances made it impossible for him to satisfy the requirements of the Test Oath Act of 1862. In sharp contrast to his action on the Stockton affair, Fessenden joined the Moderate-Conservative coalition which successfully resisted Radical efforts to deny Patterson his seat because of his failure to satisfy the Test Oath Act.[115]

Fessenden also occupied a centrist position in the deliberations of the Joint Committee and provided key votes for both Radical and Conservative proposals at different times. He almost invariably opposed black suffrage proposals.[116] He also opposed a provision which would have disqualified former rebels from holding public office.[117] At the same time, however, Fessenden voted to defer action on the proposal for unconditional restoration of Tennessee by referring it to a subcommittee.[118] Finally, Fessenden waivered on what became a critical issue—a move to require constitutionally the disenfranchisement of certain classes of ex-Confederates. At first, he voted with the Moderates and Conservatives to reject the proposal.[119] Later he voted with the Radicals to have the initial rejection reconsidered.[120] On the final vote, however, Fessenden once again voted with the Moderate-Conservative effort to reject the disenfranchisement provision.[121] In short, Fessenden was something of a swing vote on the Joint Committee.

b. *James W. Grimes*

James W. Grimes, a Moderate from Iowa, was probably the second most influential Republican Senator on the Joint Committee. He was described by a contemporary as a man who "[spoke] little and accomplishe[d] much, [and was] one of the

113. *See infra* Tables 2, 4, 6, 8.

114. For a full discussion of the Stockton affair, see *supra* notes 55–57 and accompanying text.

115. GLOBE, *supra* note 2, at 4219, 4245. For a more complete explanation of the Patterson situation, see *id.* at 4270 (remarks of Rep. Taylor).

116. *See infra* Table 4. The one exception can be found at B. KENDRICK, *supra* note 11, at 51–52.

117. B. KENDRICK, *supra* note 11, at 104.

118. *Id.* at 67.

119. *Id.* at 105.

120. *Id.*

121. *Id.* at 105–06.

pillars against whom weaker men lean[ed] and [were] propped into strength."[122] Grimes was a close friend and political ally of Fessenden, and like Fessenden voted for acquittal in the impeachment trial of Andrew Johnson. Grimes and Fessenden voted almost identically on Reconstruction issues in the full Senate[123] and also showed similar proclivities in the deliberations of the Joint Committee. The cases in which the two did split, however, do not show any clear pattern which would demonstrate that one was more radical than the other. For example, while Grimes took the more conservative position on the initial resolution to readmit Tennessee without conditions,[124] he, unlike Fessenden, ultimately voted with the Radicals on the broad disenfranchisement provision.[125] Further, while at times he voted against Radical proposals to expand the number of persons covered by disqualification provisions,[126] Grimes joined the Radicals in voting to have statutory disqualifications extended indefinitely.[127] Thus, like Fessenden, Grimes should be viewed as being a center Moderate.

c. *Jacob M. Howard*

Jacob M. Howard, a Republican from Michigan, is the one Senate Republican on the Joint Committee who is generally described as a thoroughgoing Radical. Although clearly associated with Radicalism in the Senate, Howard did join Moderates on the Senate floor on the issue of requiring black suffrage in Tennessee.[128] He returned to the Radical fold, however, by voting to exclude Patterson when the House refused to allow modification of the test oath.[129] Moreover, Howard's votes in the Joint Committee generally followed the pattern that one would expect from a Radical, namely, favoring black suffrage and stringent conditions for readmission.[130]

d. *George H. Williams*

George H. Williams of Oregon is the other Joint Committee Senate Republican who is often described as having had Radical tendencies.[131] In the first session of the

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122. *Id.* at 190.

123. *See infra* Tables 2, 4, 6, 8. Grimes' vote in favor of requiring black suffrage as a condition for the admission of Colorado to the Union, GLOBE, *supra* note 2, at 2180, is anomalous in terms of the remainder of Grimes' votes. The Colorado vote is probably best viewed as an expression of Grimes' general opposition to the admission of Colorado.

124. B. KENDRICK, *supra* note 11, at 67.

125. *Id.* at 105–06.

126. *Id.* at 112.

127. *Id.* at 95.

128. GLOBE, *supra* note 2, at 4007.

129. *Id.* at 4245.

130. *See infra* Tables 2, 4, 6, 8. One somewhat confusing aspect of Howard's behavior is his treatment of the disqualification and disenfranchisement issues. In the Joint Committee, Howard deserted his Radical allies and voted against adding a disqualification provision to the proposed constitutional amendment. B. KENDRICK, *supra* note 11, at 104. He rejoined the Radicals, however, in voting to add the disenfranchisement provision. *Id.* at 105–06. On the Senate floor, however, Howard reversed himself. Denying that he had supported disenfranchisement in the Committee, he argued in the Senate for its replacement by a disqualification section. GLOBE, *supra* note 2, at 2767–68. There is no apparent explanation for Howard's change of heart.

131. *See* W. BROCK, *supra* note 3, at 129; H. TREFOUSSE, THE RADICAL REPUBLICANS 344 (1969); *see also* F. BRODIE, *supra* note 84, at 242–43.

Thirty-ninth Congress, however, his record parallels that of a fairly conservative Moderate. On the Senate floor his voting record was very similar to those of Fessenden and Grimes except for one puzzling anomaly.[132] Moreover, his record in the Joint Committee was slightly more conservative than either Fessenden's or Grimes'. Williams voted with the Radicals to sidetrack the original proposal to unconditionally readmit Tennessee;[133] unlike either Fessenden or Grimes, however, Williams voted with the Moderates and Conservatives on each roll call dealing with the disenfranchisement provision.[134] In addition, he voted to allow each state to regain representation in Congress upon its ratification of the fourteenth amendment, rather than to allow a state to regain representation only after the amendment had actually become a part of the Constitution.[135] Thus, while Williams also should be viewed as a center Moderate, he probably was more conservative than either Fessenden or Grimes.

e. *Ira Harris*

Ira Harris, a Republican from New York, is typically viewed as the least influential and most conservative Republican Senator to have served on the Joint Committee. In general, his voting pattern evidences the latter description. He was, for example, the only Republican on the Committee to vote against unseating Senator Stockton.[136] Most of Harris' votes in the Committee itself reflect a similar attitude, although he would take a more radical stance on occasion. Harris, for example, introduced the disenfranchisement provision which was ultimately adopted by the Committee.[137] Furthermore, he supported the Radicals on important votes dealing with disqualification.[138] Nonetheless, Harris is quite properly classified as a conservative Moderate.

f. *Reverdy Johnson*

Reverdy Johnson of Maryland was the sole Senate Democrat on the Joint Committee. He was, however, of an entirely different stripe than men such as Grider and Rogers. A noted constitutional authority, Johnson remained a respected figure in the Senate although, of course, his influence was limited since his party commanded only

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132. *See infra* Tables 4, 6, 8. The anomaly lies in Williams' vote in favor of a constitutional amendment which would have provided that "no State or Territory of the United States shall . . . in any manner recognize any distinction between citizens . . . on account of race or color or previous condition of slavery." GLOBE, *supra* note 2, at 1287. Not only is this vote inconsistent with the remainder of Williams' voting record, but it is also a reversal of his position on an almost identical proposal that had been voted on only moments before.

One possible explanation of this apparent anomaly is that Williams' recorded vote is simply a clerical error in the *Globe*. The only other senator who is recorded as having differing votes on the two proposals is Henry Wilson of Iowa. On each vote, he is recorded as opposing Williams' position. Certainly "Williams" and "Wilson" are sufficiently similar that the recorder may have committed an error.

133. B. KENDRICK, *supra* note 11, at 67.

134. *Id.* at 105–06.

135. *Id.* at 109.

136. GLOBE, *supra* note 2, at 1602, 1677.

137. B. KENDRICK, *supra* note 11, at 104–05.

138. *Id.* at 104.

a small minority of adherents. Johnson was also far more moderate than, for example, Rogers; although he opposed both the Civil Rights Bill and ultimately the fourteenth amendment, Johnson supported the thirteenth amendment. Moreover, in the Joint Committee Johnson showed sympathy for some forms of civil rights amendments to guarantee black rights.[139]

3. *General Observations on the Joint Committee*

A number of general observations can be made after a review of the Joint Committee's composition. First, an important difference existed between the respective compositions of the House and Senate delegations to the Joint Committee. Men with Radical leanings—Stevens, Boutwell, Washburne, Morrill, and (on some issues) Conkling—dominated the House Republican contingent. By contrast, among Senate Republicans on the Committee only Howard was closely identified with the Radical cause.

Second, neither delegation contained a Johnson Republican—a significant faction in the first session of the Thirty-ninth Congress. Men such as Blow and Harris were certainly conservative compared to other Moderates; however, they remained within the mainstream of the Republican party, unlike representatives such as Whaley of West Virginia and Raymond of New York or senators such as Lane of Kansas and Morgan of New York, all of whom at times provided support for Johnson in his quarrels with Congress.

If one leaves the omission of Johnson Republicans aside, however, the most striking feature of the Joint Committee was its balance. A review of the individuals who served on the Committee reveals that it was composed of three Democrats (Rogers, Grider, and Johnson), three Moderates with conservative tendencies (Bingham, Blow, and Harris), three center Moderates (Fessenden, Grimes, and Williams), two Moderates with strong Radical tendencies (Washburne and Morrill), three more-or-less committed Radicals (Stevens, Boutwell, and Howard), and one person whose classification varied with the issue (Conkling). That this Committee produced a fourteenth amendment which represented a delicate series of political compromises is not surprising.

D. *Section One Voting Patterns*

The final phase in the development of section one began on April 21, 1866, when the following section was introduced as part of the Owen plan: "No discrimination shall be made by any state, nor by the United States, as to the civil rights of persons because of race, color, or previous condition of servitude."[140] Bingham immediately moved to amend this provision by adding, "nor shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation."[141] Bingham's proposal was

139. *See id.* at 85, 87–88, 99.
140. *Id.* at 83.
141. *Id.* at 85.

defeated. Johnson, Stevens, Bingham, Blow, and Rogers voted in favor of the proposal; Grimes, Howard, Williams, Washburne, Morrill, Grider, and Boutwell voted against it;[142] Fessenden, Harris, and Conkling did not participate. Thus, the section as originally proposed by Owen was adopted without a roll call vote.

On its face, the voting pattern on Bingham's proposal is somewhat surprising. The proposed change would have left the Owen language intact and added new constitutional constraints. Thus Bingham's language could only have enhanced national power over the rights of citizens. On its face, this idea might seem likely to draw Radical support. But in this case, Radicals were generally displeased with Bingham's proposal; the amendment drew its primary support from the conservative wing of the Committee—two Democrats, and Bingham and Blow, the two most conservative Republicans who voted. Six of the seven "nay" votes, on the other hand, came from more Radical elements of the Committee—four Radicals, or Moderates with Radical leanings (Howard, Washburne, Morrill, and Boutwell), and two center Moderates who were nonetheless probably more radical than Bingham (Grimes and Williams). Further adding to the confusion, the Conservative bloc was supported by one committed Radical—Stevens—and the Radical votes were joined by that of one Democrat—Grider.[143]

This voting pattern can be understood by recognizing that the Bingham amendment would not have added to constitutional protection for blacks. The Owen proposal's original text already prohibited discrimination against the freed slaves. The Bingham proposal, particularly its just compensation clause, merely extended constitutional protection to whites. In the congressional debates on civil rights measures, Bingham had expressed concern over the seizure of the white Unionists' property.[144] His amendment was intended to prevent such seizures in the future.

From a Radical perspective, the difficulty with the proposal was that it would have protected ex-confederate sympathizers as well as white Unionists. Many Radicals not only wished to exclude the southern aristocracy from the political process, but also wished to destroy the economic power of that class. One proposal to accomplish this destruction was to confiscate and redistribute the ex-confederate aristocrats' land. If southern Radicals gained control of the reconstructed governments, the Bingham amendment might have inhibited a complete economic Reconstruction. Further, unlike the Radical-supported amendment that the House had postponed on February 28, 1866, Congress could not alter the protections which would have been provided to whites. Thus, Radical votes against the Bingham proposal emerge as entirely logical.

From a Democratic perspective, the proposal created a dilemma. On one hand, it offered some protection for Democratic interests against possible future predations by Radical southern governments. On the other hand, however, restricting state governments was contrary to the basic Democratic philosophy of states' rights. Thus, the Democrats' split on the Bingham proposal is not surprising.

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142. *Id.*
143. *Id.*
144. *See* GLOBE, *supra* note 2, at 1093.

Given this dynamic, only Stevens' vote needs explanation. Because Stevens was a leading proponent of confiscation schemes, one might expect him to have opposed the just compensation provision. However, as already noted, throughout the deliberations of the Joint Committee Stevens strived to generate a proposal for Reconstruction which would unite the Republican party. Since Bingham was the leading House Moderate on the Joint Committee, Stevens' vote in favor of the Bingham proposal was probably a move designed to placate Bingham on a relatively minor matter.

Despite his initial defeat, Bingham remained steadfast in his determination to alter the proposed amendment. Later on the same day his first proposal was defeated, Bingham offered the following as an additional section:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[145]

Within the next four days the Committee voted on this proposal three times. The positions of the various committee members changed with almost dizzying speed. On April 21, 1866, the Committee approved the new section by a ten to two vote.[146] Only Grider and Rogers dissented. Fessenden, Harris, and Conkling were absent. On a motion to reconsider this proposal on April 25, 1866, however, the section was removed by a seven to five vote.[147] On the same day, an attempt to propose the Bingham language as a separate amendment drew favor only from Bingham and the three Democrats.[148]

On its face this voting pattern appears to be totally inexplicable. In four days, three roll call votes were taken on a seemingly identical issue—the question of whether Bingham's new section would be proposed in addition to the original Owen plan. Of those who participated in all three votes, every Republican except Bingham himself voted for the proposal on at least one occasion and against the proposal on at least one occasion.

In view of the Radical opposition to the "equal protection–just compensation" formulation that Bingham first proposed on April 21, 1866, Radical support for Bingham's second proposal on the same day seems particularly anomalous. Since both Bingham proposals would have left intact the initial Owen language prohibiting discrimination in civil rights on the basis of race, both proposals must be viewed as protecting the rights of the citizenry generally, rather than simply banning discrimination against blacks. Indeed, the second proposal seems considerably broader in scope, which should have magnified potential Radical objections. Yet while Radicals by and large had opposed Bingham's initial suggestion, all Republicans united around his later proposal.

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145. B. KENDRICK, *supra* note 11, at 87.
146. *Id.* at 87–88.
147. *Id.* at 98–99.
148. *Id.* at 99.

Changes in the political dynamic during the course of the meeting probably explain these anomalies in voting patterns. In the time between Bingham's first and second proposals, the Joint Committee had considered and approved each of the operative provisions of Owen's proposed constitutional amendment. With the exception of a single vote by Boutwell on the enfranchisement provision, the Republicans had unanimously supported each provision.[149] The Owen plan seemed to be the uniting force that Republicans had been seeking. The perceived need to preserve this newly found unity in all likelihood caused the more Radical members of the Joint Committee to change their positions.

The pattern of the next critical vote on Bingham's proposals reinforces the theory that the changed political dynamic caused the change in the Radicals' position. Sometime between April 21 and April 25, 1866, Republican unity among the committee members shattered. The renewed dissension is generally attributed to the Republicans' mixed views on the issue of black suffrage;[150] in any event, the voting patterns of April 21 indicated that Bingham's additions would only survive as part of a consensus package. It is not surprising, therefore, that on April 25 the Committee voted seven to five to remove Bingham's provision from the proposed amendment. The voting pattern bore a remarkable resemblance to the pattern on Bingham's initial "equal protection-just compensation" proposal; only Reverdy Johnson and Justin Morrill changed their positions.[151]

The political dynamic also explains the difference in the voting pattern on Bingham's final initiative—the attempt to have his proposal reported as a separate amendment. When included in the Owen amendment, the Bingham proposal would have cemented the support of Bingham and his allies not only for his own proposals, but for the remainder of the amendment as well. By contrast, when offered as a separate amendment the Bingham proposal was potentially extremely divisive. Democrats could argue that by voting for the separate amendment, Moderate Republicans could secure constitutional protection for the basic rights of blacks without also taking on baggage such as black suffrage which Moderates found distasteful. If the Democrats could convince Moderates to take this position, reduction in the South's representation might also be avoided. Using the Bingham proposal in this manner would be particularly attractive to Democrats if its protection for black rights were weaker than the civil rights provision of the Owen proposal, a question discussed below.[152] The potential divisive effect of a separate amendment dealing with civil rights explains the unanimous Republican rejection of Bingham's final initiative on April 25, 1866, as well as the strong Democratic support for that initiative.

The prospects for any proposal drafted along the lines advocated by Bingham seemed quite dim at this stage. The Owen plan as a whole, however, also seemed to

149. *See id.* at 86–87.

150. *See, e.g.*, B. KENDRICK, *supra* note 11, at 302; E. MCKITRICK, *supra* note 3, at 347.

151. Johnson, who voted with Bingham on April 21, voted against him on April 25. The explanation for this change may have been distaste for the privileges and immunities clause which was not included in Bingham's original April 21 proposal. *See* GLOBE, *supra* note 2, at 3041 (motion of Senate floor to remove privileges and immunities clause). Morrill voted against Bingham on April 21, but with him on April 25. There are no clues to Morrill's motives.

152. *See infra* text accompanying notes 163–66.

be in considerable difficulty. By a margin of seven to six, the Joint Committee voted to report to the floor a constitutional amendment similar to the Owen proposal and to report a bill which would have allowed restoration of southern congressional representation when certain conditions were met.[153] However, the opposition of Republicans as diverse as Boutwell, Conkling, and Blow hardly augered well for the prospects of gaining either the two-thirds vote in both houses of Congress necessary to propose a constitutional amendment, or the approval of three-quarters of the states necessary to ratify that amendment. The major problem was not the Bingham proposals; while controversial, they were apparently not critical, even to him. Instead, the black suffrage issue was the major stumbling block to Republican unity. Many important Republican state organizations clearly indicated that they did not wish to conduct an election campaign on a platform which endorsed black suffrage in any form.[154]

The unpopularity of the black suffrage concept confronted Radicals with a delicate tactical problem. One alternative was to fight for the retention of the suffrage provision even though that provision placed the entire Republican Reconstruction program in jeopardy. This was a high risk strategy because if the fourteenth amendment failed in Congress, Republicans would be left without an alternative, coherent plan to conservative presidential Reconstruction.

Despite the risks, Radicals initially seemed determined to pursue this strategy. On an April 25, 1866 motion to reconsider the vote to adopt the fourteenth amendment, two of the three Radicals participating,[155] Stevens and Howard, voted against reconsideration. Boutwell, the remaining Radical, probably voted to reconsider not because he objected to the principle of black suffrage, but rather because the proposed amendment postponed suffrage until 1876. By contrast, the solid coalition of Moderates and Conservatives who joined Boutwell to carry the motion to reconsider[156] were probably motivated by a distaste for the suffrage provision.

Shortly after the vote for reconsideration, many of the Radicals on the Joint Committee changed course. Rather than consistently pressing for the most radical language possible, these Radicals apparently decided to accept a more moderate proposal which appeared to have a better chance for ultimate adoption. To this end, on April 28, 1866, Stevens, the leading House Radical, moved to delete the suffrage provision altogether.[157] The motion carried overwhelmingly; Stevens was joined not only by all of the Conservative and Moderate members of the Committee, but also by the hard core Radical Boutwell and by Justin Morrill, who generally supported Radical positions. Only Washburne and the Radical Senator Howard dissented.[158] The elimination of the suffrage provision created potential problems for section two, which dealt with the basis of representation. Some permanent change was necessary

153. B. KENDRICK, *supra* note 11, at 99.
154. *See id.* at 302; E. MCKITRICK, *supra* note 3, at 347.
155. Morrill and Washburne did not vote on the motion to reconsider.
156. B. KENDRICK, *supra* note 11, at 100.
157. *Id.* at 101.
158. *Id.*

to reduce southern political power. The problem was to draft a proposal which would avoid the impasse that had ultimately defeated the Joint Committee's proposal earlier in the session. The Committee ultimately adopted a compromise between a representation amendment which based representation on legal voters and the Owen provision which focused only on racial exclusions. Only Howard, Stevens, and Washburne dissented.[159]

At this stage the Radicals launched an offensive. Boutwell first attempted to include a provision that would permanently disqualify large numbers of ex-Confederates from national office. This measure narrowly failed to pass the Committee.[160] A motion was then made to add, as section three, a provision to prevent virtually all ex-rebels from voting in national elections until 1870. Although proposed by the conservative Moderate Harris, the measure drew its primary support from Radicals. The measure was initially defeated by a vote of eight to seven;[161] a dramatic shift of position by Grimes, however, reversed this vote and added the disenfranchisement provision which banned ex-rebel votes until 1870 to the proposed constitutional amendment.[162]

Against this background, Bingham made his final effort to modify the Owen amendment. He moved that the Committee replace Owen's section one with the equal protection-due process-privileges and immunities language which had initially been accepted on April 21 and removed on April 25, 1866. The motion carried by a vote of ten to three. Only Grimes, Howard, and Morrill dissented; Fessenden and Harris did not vote.[163]

The voting pattern on the Bingham substitute clearly reflects the Moderate origin of the current language of section one. The more Moderate and Conservative elements of the Committee were virtually unanimous in their support of the proposal. Among this group only Grimes dissented. One would hardly expect such near unanimity unless the proposal softened the language of section one.

One immediate problem with this interpretation is the Radical voting pattern on the Bingham substitute. A solid negative Radical vote would confirm the impression that the substitute was a Moderate proposal. No such clear voting pattern emerged, however; instead, Radicals split almost evenly in their votes on the substitute language.

In political context, this split is entirely consistent with the premise that the current section one has Moderate roots. Radicals who voted on the proposal were faced with a tactical problem analogous to the problem that confronted them on the black suffrage issue. In isolation, Radicals might have preferred the Owen language. However, they also had to consider the problem of drafting an amendment which would pass. Mollifying the Moderates on the civil rights issue might have sounded particularly attractive in view of the proposed amendment which already contained an important Radical initiative—the disenfranchisement provision. In a situation such as

159. *Id.* at 102.
160. *See id.* at 104.
161. *Id.* at 105.
162. *See id.* at 105–06.
163. *Id.* at 106–07.

this, one might expect a split between those Radicals who sought a political compromise and those who adhered rigidly to principle.

If the split in Radical ranks were the only available evidence, one might conclude that the Bingham proposal's major objective was to extend section one beyond the context of racial discrimination. This explanation, however, does not explain the behavior of the conservative Moderates Conkling and Williams, or the Democrats Johnson and Grider. Earlier, each had voted against the Bingham language, presumably because it unduly expanded the reach of constitutional protections.[164] Yet on the crucial ballot of April 28, 1866, all four supported Bingham.[165]

One crucial factor explains the change in votes. Unlike earlier votes on the Bingham language, the April 28 roll call was on a *substitute* for section one of the Owen plan, rather than an *addition* to the protections of that plan. This distinction has two important consequences. First, taken together with the elimination of the black suffrage provision and the alteration of section two, the change in section one created a Reconstruction plan which never mentioned race. Thus, in the upcoming election of 1866, Republicans would not need to run as the champion of black rights. Instead, the Republican party could present its platform as the guarantee of the defeated southern states' loyalty and the protection of fundamental rights of Loyalists generally. This prospect must have appealed to Moderates such as Conkling and Williams.

This explanation, however, fails to explain the actions of Grider and Johnson. As Democrats, they would hardly be moved by an appeal to improve the political salability of the Republican platform. Only one explanation for the Democratic shift is consistent with the Republican voting pattern: while extending constitutional protection beyond the problem of racial discrimination, the Bingham substitute must have been aimed at a narrower class of rights than the Owen proposal.

As an explanation of Moderate support for the Bingham language, this theory fits comfortably with the pattern of earlier actions of the Thirty-ninth Congress. For example, Moderates in the House only supported the Civil Rights Bill after it had been modified to avoid the possibility of an overly expansive judicial interpretation. Furthermore, the defeat of the early proposal, which would have expanded congressional power over individual rights, was largely due to fears that the proposal was unduly broad. A Moderate initiative to narrow the Owen plan's protections thus would be entirely compatible with earlier Moderate actions on the same issue.[166]

Some might argue that this is circumstantial evidence and that given the "majestic generalities" of the *language* of section one, the most plausible inference is that the Framers intended to protect a broad range of rights. Viewed from a purely twentieth century perspective, the equal protection-privileges and immunities formulation seems very wide ranging indeed. However, one must always remember that the drafters were not twentieth century men; instead, they wrote in 1866. In the context of mid-nineteenth century America, the language of the Bingham substitute had quite different connotations.

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164. *See id.* at 87, 98, 99. *See generally supra* notes 140–54 and accompanying text.

165. B. KENDRICK, *supra* note 11, at 87.

166. *See supra* text accompanying notes 48–54.

To understand these connotations, one must first examine the controversy over the meaning of "civil rights." In the mid-1860s, most mainstream Republicans agreed that the term did not include all rights which were, or might be, guaranteed. Instead, the 1860 Americans distinguished two mutually exclusive sets of rights: "civil rights"—rights which belong to all men as a matter of natural law—and "political rights"—rights which are granted by the grace of the government.[167] The rights to contract and to own property were clearly in the former group; the right to vote was clearly in the latter.

Democrats and a small group of mainstream Republicans led by Bingham were skeptical of this dichotomy. They believed that the term "civil rights" might be interpreted to include all rights, including the right to vote.[168] This fear, together with general uncertainty on the question of which rights were "political" and which were "civil," forced the recommittal of the Civil Rights Bill and the eventual deletion of the general reference to civil rights.[169]

The same impulse no doubt moved Democrats and Moderate Republicans to vote to alter the Owen proposal. The key question remains: Why was the specific language of the Bingham substitute chosen? To understand the choice of the terms "equal protection," "privileges and immunities," and "due process of law," one must refer to the pre-Civil War abolitionist literature. This literature reflected interrelated ethical and constitutional arguments. In large measure, abolitionist arguments against slavery focused on the unfairness of subjecting the slave to the arbitrary whims of his master rather than on protecting a slave's rights and obligations by law. In particular, the arguments often focused on the denial of the slaves' rights to acquire and own property, as well as the subjection of slaves to various forms of physical restraint and abuse with no legal redress.[170]

In essence, the equal protection and due process components of the Bingham substitute defined the condition which was the antithesis of slavery. Slaves could be assaulted, imprisoned, or deprived of property on any pretense, and they had no legal redress. The equal protection and due process clauses, by contrast, ensured that blacks would be subject only to those criminal penalties applicable to whites, and guaranteed blacks access to the courts. The discussions of section one on the House and Senate floors reflect this view.[171] For example, in introducing the proposed

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167. For one of the clearer statements of the distinction between "natural" and "political" rights, see GLOBE, *supra* note 2, at 356 (remarks of Rep. Conkling). For examples of other limited conceptions of "civil rights," see *id.* at 474 (remarks of Sen. Trumbull); *id.* at 1366 (remarks of Rep. Wilson) (by implication). *Compare id.* at 1291 (remarks of Rep. Bingham) (suggesting term "civil rights" invites broad construction).

168. *See id.* at 1291 (remarks of Rep. Bingham); *id.* at 1120 (remarks of Rep. Shanklin) (by implication).

169. *Id.* at 1296, 1366–67. *See* M. BENEDICT, *supra* note 3, at 162.

170. *See* H. GRAHAM, *The Early Antislavery Background of the Fourteenth Amendment*, in EVERYMAN'S CONSTITUTION 206, 207, 231–32 (1968) and sources cited therein.

171. There are numerous, published studies of the congressional debates surrounding the adoption of the fourteenth amendment. Many are quite partisan, *e.g.*, compare R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) (arguing for narrow intent of framers) with Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979) (arguing for broad intent of framers).

Among the most judicious and comprehensive studies are Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955) and Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949).

amendment to the House of Representatives, Thaddeus Stevens described the impact of the equal protection and due process clauses as follows:

> Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same.[172]

Jacob Howard introduced the amendment in the Senate and expressed an analogous understanding of equal protection and due process:

> [These clauses abolish] all class legislation in the States and [do] away with the injustice of subjecting one caste of persons to a code not applicable to another. [They prohibit] the hanging of a black man for a crime for which the white man is not to be hanged. [They protect] the black man in his fundamental rights as a citizen with the same shield which [they throw] over the white man.[173]

Like the due process clause, the language of the privileges and immunities clause was derived from a preexisting constitutional provision, in this case, the so-called comity clause in article four. Republicans often had argued that northern and southern states violated the comity clause by denying fundamental rights to both free blacks and abolitionists.[174] The problem, as viewed by some Republicans, was that the Constitution did not grant Congress authority to enforce the comity clause. By including identical language in an amendment with a specific enforcement provision, this problem would be resolved.[175]

One difficulty with the privileges and immunities formulation was defining the scope of "privileges and immunities." The Bill of Rights was one frequently cited source. Both John Bingham and Jacob Howard, for example, indicated that each of the first eight amendments was included within the definition of privileges and immunities.[176] Other congressmen referred to individual Bill of Rights provisions when they discussed the comity clause.[177] No one, however, believed that the Bill of Rights was the *only* source of privileges and immunities. Frequent references were

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172. GLOBE, *supra* note 2, at 2459.

173. *Id.* at 2766.

174. *See id.* at 42 (remarks of Sen. Sherman); *id.* at 158 (remarks of Rep. Bingham).

175. *See id.* at 2961 (remarks of Sen. Poland); *id.* at 158 (remarks of Rep. Bingham).

176. Howard was very clear on this point in his speech introducing the proposed fourteenth amendment to the Senate. *Id.* at 2765. No commentator seems to challenge the impact of his interpretation on this point.

Bingham's statements have been more controversial. On a number of occasions he equated the privileges and immunities clause with a "bill of rights." On some of those occasions he seemed to be referring to a natural law concept. *See id.* at 1033–34. Other references, however, clearly implicate the first eight amendments. *See id.* at 1089–90 (Congressional power amendment would have overruled Livingston v. Moore, 32 U.S. (7 Pet.) 469 (1833), and Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833), by giving Congress the authority to require states to enforce the Bill of Rights.); CONG. GLOBE, 42d Cong., 1st Sess. app. 84 (1871) (privileges and immunities chiefly defined by first eight amendments). Some noted commentators have argued, however, that the latter reference should not be taken at face value. *See* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 STAN. L. REV. 5, 33–36, 136–37 (1949). *Compare* H. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 80, 233–35 (1908).

177. *See, e.g.*, GLOBE, *supra* note 2, at 1838 (remarks of Rep. Clarke) (right to bear arms); CONG. GLOBE, 38th Cong., 2d Sess. 193 (1865) (remarks of Rep. Kasson) (first amendment). *See generally* H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875, at 404–05 (1982) and sources cited therein.

made to the right to travel[178] and to the right of access to courts.[179] Other protected interests were also mentioned at times.[180] The uncertainty of the scope of the language must have concerned Democrats and some Moderate Republicans.[181]

Despite this uncertainty, Moderates and Conservatives had good reasons to prefer the privileges and immunities formulation over Owen's original civil rights proposal. While some construed the term civil rights very broadly, all mainstream Republicans agreed that privileges and immunities encompassed only those interests which are "fundamental."[182] Perhaps most important, while some Republicans such as Bingham feared that a guarantee of "civil rights" would include the right to vote, no Republicans thought the right to vote was included among "privileges and immunities."[183] Thus, the near unanimous Moderate-Conservative support for the Bingham substitute is not surprising.

E. *Epilogue*

The proposed fourteenth amendment was reported to both houses of Congress on April 30, 1866. The amendment was part of a unified package which included two other bills—one providing for restoration of southern states' representation upon ratification of the amendment and the other disqualifying certain ex-Confederates from national office.[184] The Committee report relating to this package was largely devoted to reaffirming and demonstrating congressional authority over the Reconstruction process and demonstrated that the ex-confederate states were not yet entitled to readmission or representation in Congress. In general, the report did not provide detailed analyses of the substantive effects of either the proposed amendment or the two accompanying Reconstruction bills. The only exception was section two, which dealt with the problem of potentially increased southern representation; this issue was characterized as "the most important element in the question arising from [the freeing of the slaves]."[185] The Committee, with some apparent regret, noted the reasons for its decision not to regulate suffrage directly, and also expressed the hope that the "gentle and persuasive" provisions of section two would lead the southern states to grant the right to vote as a matter of state law.[186]

No direct reference is made to section one as such. The report, however, does make numerous references to widespread abuse of both freed slaves and Union sympathizers, as well as to the need to provide "guarantees as will tend to secure the

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178. *See, e.g.*, GLOBE, *supra* note 2, at 42 (remarks of Sen. Sherman); CONG. GLOBE, 35th Cong., 2d Sess. 974–75 (1859) (remarks of Rep. Dawes); CONG. GLOBE, 35th Cong., 1st Sess. 1966 (1858) (remarks of Sen. Fessenden).

179. *See, e.g.*, GLOBE, *supra* note 2, at 475 (remarks of Sen. Trumbull); CONG. GLOBE, 35th Cong., 2d Sess. 987 (1859) (remarks of Rep. Hoard).

180. *See, e.g.*, CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859) (remarks of Rep. Bingham).

181. *See* GLOBE, *supra* note 2, at 3041 (remarks of Sen. Johnson). *See generally id.* at 2765 (remarks of Sen. Howard: "It would be a curious question to solve what are the privileges and immunities of citizens.").

182. *See id.* at 475 (remarks of Sen. Trumbull) (by implication).

183. *Compare id.* at 1291 (remarks of Rep. Bingham) *with* CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859) (remarks of Rep. Bingham).

184. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 73, at IV–V.

185. *Id.* at XIII.

186. *Id.*

civil rights of all citizens of the republic."[187] No clue is given, however, to the precise extent of the rights that would be protected by the proposed amendment.

Section one of the fourteenth amendment survived its passage through both houses of Congress without any fundamental changes. In the House, the debate focused primarily on section three, the disenfranchisement provision. On a motion by Thaddeus Stevens, however, the House voted narrowly to forbid amendments to the Joint Committee proposal.[188] The amendment then passed easily.[189]

In the Senate, the scene was much more chaotic. The senators vigorously debated the forms of both section three and section two, the provision dealing with the basis of representation. Ultimately, Republican senators adjourned to a closed caucus from which emerged the fourteenth amendment in its final form. The major change to which the caucus agreed was the replacement of the disenfranchisement provision with a section disqualifying substantial numbers of confederate leaders from public office.[190] The only change which emerged in section one was the addition of the definition of citizenship. The caucus proposal was widely viewed as a Moderate or even Conservative Reconstruction measure.[191]

On the Senate floor, Reverdy Johnson moved to delete the privileges and immunities clause. This motion was defeated as were all other proposed changes in the caucus proposal.[192] The Senate then passed the proposed amendment by the requisite majority,[193] and the House concurred.[194]

Despite the passage of the fourteenth amendment, neither house of Congress acted on the companion bill which provided for readmission upon ratification.[195] The question whether ratification of the amendment automatically entitled southern states to readmission thus remained a hotly debated issue dividing Moderates and Radicals.[196] This issue rapidly became moot, however. Encouraged by Andrew Johnson's strong opposition to the amendment, all of the southern states, except Tennessee, overwhelmingly voted against ratification. The stage was thus set for the more Radical Reconstruction measures of the second session of the Thirty-ninth Congress.

IV. CONCLUSION

In a sense, the results of an examination of the fourteenth amendment's political background and the proceedings of the Joint Committee on Reconstruction are some-

187. *Id.* at XVII–XVIII, XX–XXI.
188. GLOBE, *supra* note 2, at 2545.
189. *Id.*
190. *See* B. KENDRICK, *supra* note 11, at 316.
191. *See* E. MCKITRICK, *supra* note 3, at 335–36.
192. GLOBE, *supra* note 2, at 3041.
193. *Id.* at 3042.
194. *Id.* at 3149.
195. For differing interpretations of the refusal of Congress to adopt the restoration bill, compare B. KENDRICK, *supra* note 11, at 320–53 with E. MCKITRICK, *supra* note 3, at 355–63.
196. *Compare* GLOBE, *supra* note 2, at 3208–11 (remarks of Rep. Julian) *with id.* at 2598–99 (remarks of Rep. Bingham).

what disappointing. Unfortunately, the analysis does not yield a clear list of interests which the framers of section one intended to protect. The difficulty arises for two reasons. First, the choice of language was part of a complex series of political compromises which generated the fourteenth amendment as a whole. Second and equally important, the framers themselves evinced no clear consensus on the meaning of the language of section one, particularly the privileges and immunities clause.

Nonetheless, a close study of the amendment's background yields insights on a number of important points. In general, these insights undercut the claims of those who advocate judicial activism. The voting pattern in the Joint Committee, as well as the overall political context, clearly indicates that section one was ultimately a reflection of Moderate Republican thinking. Although committed to expanding the scope of federal rights, these Moderate Republicans also desired to preserve the existing governmental structure. In particular, the Moderate origins of section one undercut the open-ended theories of the framers' intent. Such theories hold that the framers intended to constitutionalize not only *specific* rights, but also more general rights of fairness, the specific content of which would change over time as mores and conditions changed.[197] In essence, such an interpretation would transfer ultimate authority over a whole raft of basic moral and political decisions from the state level, where the authority rested prior to the Civil War, to the federal level—the Supreme Court. This centralization of authority might have been acceptable or even desirable to Radicals; it was antithetical, however, to Moderates who were demonstrably committed to maintaining the authority of the states within the federal system.

More specifically, a close study of the political context further illuminates the framers' position on the matter of voting rights. This issue has been discussed frequently by both judges and commentators. Focusing primarily on negative inferences from section two and the floor debates on the amendment generally, both Justice Harlan and Raoul Berger conclude that the framers specifically intended to exclude voting from the coverage of section one.[198] Others, such as William Van Alstyne and John Hart Ely, have taken contrary positions.[199]

The voting patterns in the Joint Committee and the overall political context provide support for the Harlan-Berger position. First, the issue of black suffrage was the main stumbling block to the adoption of any constitutional amendment. Second, on the climactic final day, a proposal which dealt directly with the issue of suffrage was replaced with one which dealt solely with an adjustment to the basis of representation. Third, one of the objections to the use of the term "civil rights" in another context was that it might be construed to include the right to vote; by contrast, no Republican believed that the language ultimately chosen would be interpreted to

197. For examples of open-ended theories, see, *e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 133–37 (1977); J. ELY, DEMOCRACY AND DISTRUST 11–41 (1980); Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93, 126–37 (1983).

198. *See* Reynolds v. Sims, 377 U.S. 533, 595–602 (1964) (Harlan, J., dissenting); R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 52–68 (1977).

199. *See* J. ELY, *supra* note 197, at 118–19; Van Alstyne, *The Fourteenth Amendment, The "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33.

cover suffrage. Finally, the primary support for the replacement of the Owen section one with the Bingham substitute came from a coalition of Democrats and Moderate Republicans—the same coalition which blocked black suffrage proposals throughout the first session of the Thirty-ninth Congress. All of these factors strengthen the conclusion that the adoption of the Bingham language was in some measure an attempt to preclude the possibility that the proposed fourteenth amendment would affect state control over suffrage.

All of this evidence is of course circumstantial; taken alone, some might not consider it conclusive. The Joint Committee Report, however, provides strong direct evidence which also supports the Harlan-Berger position. Black suffrage was the one civil rights issue extensively discussed by the report. According to the report, the decision of the Committee was "to leave the whole question with the people of each state subject to the penalty provisions of section two."[200] It is difficult to conceive a clearer indication of an intent to exclude suffrage from the operation of the fourteenth amendment.[201]

Of course, some might argue that the black suffrage discussion only applied to section two, and that one is perfectly free to read section one more broadly. By its terms, however, the report's discussion is not aimed at any particular section; rather, the discussion deals with the problems of voting rights and the basis of representation generally. Thus, particularly in view of the Moderate origins of the section one language, it seems fanciful to argue that the drafters of the fourteenth amendment intended to leave open the suffrage issue.

Some facets of section one's background, however, provide support for a measure of judicial activism. The replacement of the Owen proposal with the Bingham language precludes any argument that section one was intended to affect only the rights of blacks. Moreover, the background of the privileges and immunities clause provides evidence that the language encompasses not only the entire Bill of Rights, but other rights as well.

In short, while no single methodology can entirely resolve the debate over the intent of the framers of the fourteenth amendment, an analysis of the general political context of the Reconstruction era provides important insights. For if one understands this context, he can eliminate as possibilities a number of other plausible interpretations of the framers' intent. Thus, political analysis provides an important adjunct to more traditional ways of ascertaining the intended meaning of section one.

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200. REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, *supra* note 73, at XII.

201. Of course, none of the foregoing should be taken to suggest that the fourteenth amendment was intended to limit preexisting constitutional constraints on state control over voting rights. For example, one aspect of the Radical faith was that denial of suffrage on the basis of race violated the constitutional guarantee of a republican form of government embodied in article four, section four. *See, e.g.*, GLOBE, *supra* note 2, at 426 (remarks of Rep. Higby); *id.* at 383 (remarks of Rep. Farnsworth). *See generally* Van Alstyne, *supra* note 199, at 49–55.

Viewed against the historical background of the guaranty clause, the Radical interpretation was dubious at best. *See* GLOBE, *supra* note 2, at 383 (colloquy between Reps. Farnsworth and Hale); CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859) (remarks of Rep. Bingham) (noting that at the time the Constitution was framed, some states denied blacks the right to vote). *See generally* W. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION (1972). At best, it establishes only *congressional*, not judicial, power to regulate suffrage. *See* Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (claims under guaranty clause present nonjusticable political questions). In any event, the basic point remains unaffected—the drafters of section one intended that it would not *add* to federal control over the suffrage.

APPENDIX

THE VOTING PATTERNS OF THE MEMBERS OF THE JOINT COMMITTEE ON RECONSTRUCTION

Key to Symbols in Tables 1–8

R = More Radical Position

C = More Conservative Position

M = Moderate Position

MC = Moderate Conservative Position

X = Extreme Position taken by both Conservatives and Radicals

U = Unclear; vote on issue not correlated with Conservatism, Moderation, or Radicalism

NV = Not voting

The information on the Joint Committee votes in these tables was obtained from B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION (1969). The information on the Floor votes was obtained from the *Congressional Globe*.

TABLE 1—Votes on Section 1—Representatives

Issues / Representative	Strike out "equal political rights and privileges" 1/27/66 Yea = Conservative	Report Amendment 1/27/66 Nay = Extreme position	Bingham replacement 2/3/66 Nay = Conservative	Agree to Amendment 2/3/66 Nay = Conservative	Report Amendment 2/3/66 Nay = Conservative	First Bingham addition 4/21/66 Unclear pattern	Second Bingham substitute 4/21/66 Nay = Conservative	Motion to remove section 5 4/25/66 Unclear pattern	Separate Article 4/25/66 Yea = Conservative	Ultimate Section 1 4/28/66 Unclear pattern
Rogers	NV	NV	R	C	C	U	C	U	C	U
Grider	C	X	C	C	C	U	C	U	C	U
Bingham	R	M	R	R	R	U	R	U	C	U
Blow	NV	NV	NV	NV	R	U	R	U	R	U
Morrill	R	M	R	R	R	U	R	U	R	U
Washburne	NV	NV	R	R	NV	U	R	NV	NV	U
Conkling	C	X	C	C	C	NV	NV	U	R	U
Stevens	R	M	C	R	R	U	R	U	R	U
Boutwell	R	X	R	R	R	U	R	U	R	U

TABLE 2—Votes on Section 1—Senators

Issues / Senator	Strike out "equal political rights and privileges" 1/27/66	Report Amendment 1/27/66	Bingham replacement 2/3/66	Agree to Amendment 2/3/66	Report Amendment 2/3/66	First Bingham addition 4/21/66	Second Bingham substitute 4/21/66	Motion to remove section 5 4/25/66	Separate Article 4/25/66	Ultimate Section 1 4/28/66
	Yea = Conservative	Nay = Extreme position	Nay = Conservative	Nay = Conservative	Nay = Conservative	Unclear pattern	Nay = Conservative	Unclear pattern	Yea = Conservative	Unclear pattern
Johnson	C	C	NV	NV	C	U	R	U	C	U
Harris	C	C	C	C	C	NV	NV	U	NV	NV
Fessenden	R	R	C	R	R	NV	NV	NV	NV	NV
Grimes	NV	NV	C	R	R	U	R	NV	R	U
Williams	R	R	R	R	R	U	R	U	R	U
Howard	NV	NV	R	R	R	U	R	U	R	U

TABLE 3—Votes on Black Rights—Representatives

Issues / Representative	Black Suffrage: In the Full House: Postpone D.C. Suffrage Bill 1/18/66 — Yea = Moderate Conservative	Limit D.C. Suffrage 1/18/66 — Yea = Moderate Conservative	Passage of D.C. Suffrage Bill 1/18/66 — Nay = Conservative	Colorado 5/3/66 — Yea = Radical	No new territories to be admitted without black suffrage 5/27/66 — Nay = Conservative	Nebraska 7/27/66 — Nay = Radical	Black Suffrage: In the Joint Committee: Tennessee 2/20/66 — Yea = Radical	Section 2 of Amendment 4/21/66 — Nay = Extreme Position	Removal of Section 2 4/28/66 — Nay = Radical	Black Rights Generally: Recommit Civil Rights Bill with limiting instructions 3/9/66 — Yea = Moderate Conservative	Motion to recommit Civil Rights Bill without instructions 3/9/66 — Yea = Conservative
Rogers	U	U	C	NV	C	NV	C	X	C	U	C
Grider	U	U	C	C	C	NV	C	X	C	NV	C
Bingham	U	U	R	C	R	C	C	M	C	MC	C
Blow	U	MC	R	C	NV	NV	NV	M	C	MC	C
Morrill	U	U	R	R	R	R	R	M	C	U	C
Washburne	U	U	R	R	NV	NV	R	M	R	U	R
Conkling	MC	MC	R	C	R	C	C	NV	C	MC	C
Stevens	U	U	R	R	R	R	R	M	C	U	R
Boutwell	U	U	R	R	R	R	R	X	C	U	R

TABLE 4—Black Rights—Senators

Issues / Senator	Black Suffrage					Black Rights Generally	
	In the Full Senate		In the Joint Committee				
	Amendment to proposed Constitutional amendment on representation Mar. 9, 1866	Tennessee July 21, 1866	Tennessee Feb. 20, 1866	Section 2 of Amendment April 21, 1866	Removal of Section 2 April 28, 1866	Amendment providing full equality for blacks (1) Mar. 9, 1866	Amendment providing full equality for blacks (2) Mar. 9, 1866
	Yea = Radical	Yea = Radical	Yea = Radical	Nay = Extreme Position	Nay = Radical	Yea = Radical	Yea = Radical
Johnson	C	C	NV	X	U	C	C
Harris	C	C	C	M	U	C	C
Fessenden	C	C	NV	M	NV	C	C
Grimes	C	C	NV	M	U	C	C
Williams	C	C	C	M	U	C	R
Howard	NV	C	R	M	R	NV	NV

TABLE 5—General Conditions for Restoration of Representation—Representatives

Issues / Representative	On the House Floor	In the Joint Committee											
	Motion to bar amendment to resolution proposing fourteenth amendment May 10, 1866	Change particulars of disqualification provision April 23, 1866	Make disqualification permanent April 23, 1866	Expansion of disqualification provision April 28, 1866	Agreement to disqualification provision April 28, 1866	Disenfranchisement provision April 28, 1866	Motion to reconsider April 28, 1866	On reconsideration April 28, 1866	Allowing each state to be readmitted when it ratifies fourteenth amendment April 28, 1866	Contract disqualification provision April 28, 1866	Contract disqualification provision April 28, 1866	Amendment to resolution providing for readmission April 28, 1866	Motion to table resolution April 28, 1866
	Yea = Extreme Position	Nay = Conservative	Yea = Extreme Position	Yea = Radical	Yea = Radical	Yea = Radical	Yea = Radical	Yea = Radical	Yea = Moderate	Nay = Radical	Yea = Conservative	Nay = Conservative	Yea = Radical
Rogers	X	C	X	C	C	C	C	C	X	C	C	C	C
Grider	X	NV	NV	C	C	C	C	C	X	C	C	C	C
Bingham	M	C	M	C	C	C	C	C	M	C	R	R	R
Blow	M	C	M	C	C	C	C	C	M	C	R	C	C
Morrill	X	R	M	C	R	R	R	R	X	C	R	R	R
Washburne	X	R	X	R	R	R	NV (pair)	NV (pair)	NV	R	R	NV	NV
Conkling	X	R	X	R	R	R	R	R	X	R	R	R	C
Stevens	X	R	X	R	R	R	R	R	X	R	R	R	R
Boutwell	X	R	X	C	R	R	R	R	X	R	R	NV	NV

TABLE 6—Conditions for Restoration of Representation—Senators

Issues / Senator	Change particulars of disqualification provision April 23, 1866 Nay = Conservative	Make disqualification permanent April 23, 1866 Yea = Extreme Position	Expansion of disqualification provision April 28, 1866 Yea = Radical	Agreement to disqualification provision April 28, 1866 Yea = Radical	Disenfranchisement provision April 28, 1866 Yea = Radical	Motion to reconsider April 28, 1866 Yea = Radical	On reconsideration April 28, 1866 Yea = Radical	Allowing each state to be readmitted when it ratifies fourteenth amendment April 28, 1866 Yea = Moderate	Contract disqualification provision April 28, 1866 Nay = Radical	Contract disqualification provision April 28, 1866 Yea = Conservative	Amendment to resolution providing for readmission April 28, 1866 Nay = Conservative	Motion to table resolution April 28, 1866 Yea = Radical
Johnson	C	M	C	C	C	C	C	C	C	R	C	C
Harris	NV	NV	C	R	R	R	R	NV	R	R	R	C
Fessenden	NV	NV	C	C	C	R	C	R	C	R	R	C
Grimes	R	X	C	NV	C	R	R	R	C	C	R	C
Williams	R	M	C	C	C	NV (pair)	NV (pair)	C	C	R	R	R
Howard	R	X	C	C	R	R	R	R	R	R	R	R

TABLE 7—Restoration of Tennessee Representation—Representatives

Issues / Representative	On the House Floor									
	Table resolution granting Tennessee representatives the privilege of the floor noting that they "appear to have been elected." Dec. 12, 1865	Invite Tennessee representatives to "occupy seats in the Hall of the House of Representatives" Dec. 12, 1865	Preliminary Motions of Resolution to Restore Tennessee July 19, 1866–July 20, 1866								Passage of Tennessee Resolution July 20, 1866
	Nay = Conservative	Nay = Radical	Yea = Radical	Yea = Radical	Yea = Radical	Yea = Radical	Yea = Radical	Yea = Radical	Nay = Extreme	Nay = Extreme	Nay = Radical
Rogers	NV	C	NV	NV	NV	NV	NV	NV	X	X	U
Grider	C	C	NV	NV	NV	NV	NV	NV	NV	NV	NV
Bingham	R	C	C	C	C	C	C	C	M	M	U
Blow	C	C	NV	NV	NV	NV	NV	NV	NV	NV	NV
Morrill	R	C	R	R	R	R	R	R	M	M	U
Washburne	R	C	NV	NV	NV	NV	NV	NV	NV	NV	NV
Conkling	NV	C	C	C	R	R	C	NV	X	X	U
Stevens	R	C	R	R	R	R	R	R	X	X	U
Boutwell	R	R	R	R	R	R	R	R	X	X	R

TABLE 7 (cont.)—Restoration of Tennessee Representation—Representatives

Issues / Representative	In the Joint Committee							
	Referral of Bingham proposal to subcommittee Feb. 17, 1866	Black suffrage Feb. 20, 1866	Omit passage which provides that Tennessee can only exercise function of state "by the consent of the lawmaking power of the United States" Feb. 20, 1866	Agreement to Resolution Feb. 20, 1866	Agreement to Preamble Feb. 20, 1866	Requirement that conditions be ratified by legislature Mar. 5, 1866	Omit passage which provides that Tennessee can only exercise function of state "by the consent of the lawmaking power of the United States" Mar. 5, 1866	Agreement to Resolution Mar. 5, 1866
	Yea = Radical	Nay = Radical	Yea = Conservative	Nay = Radical	Nay = Extreme Position	Nay = Conservative	Yea = Conservative	Nay = Extreme Position
Rogers	C	C	C	C	X	C	C	X
Grider	C	C	C	C	M	C	C	X
Bingham	C	C	R	C	M	C	R	M
Blow	C	NV	NV	C	M	NV	NV	NV
Morrill	R	R	R	R	X	R	R	M
Washburne	R	R	R	R	M	R	R	X
Conkling	R	C	NV	NV	NV	R	R	M
Stevens	R	R	R	C	X	R	R	M
Boutwell	R	R	R	R	X	R	R	X

TABLE 8—Restoration of Tennessee Representation—Senators

Issues / Senator	On the Senate Floor				In the Joint Committee							
	Substitute Tennessee Preamble July 21, 1866	Oath requirement July 21, 1866	Admission of Tennessee without suffrage July 21, 1866	Seating of Patterson with unmodified oath July 21, 1866	Referral of Bingham proposal to subcommittee Feb. 17, 1866	Black suffrage Feb. 20, 1866	Omit passage which provides that Tennessee can only exercise function of state "by the consent of the lawmaking power of the United States," Feb. 20, 1866	Agreement to Resolution Feb. 20, 1866	Agreement to Preamble Feb. 20, 1866	Requirement that conditions be ratified by legislature Mar. 5, 1866	Omit passage which provides that Tennessee can only exercise function of state "by the consent of the lawmaking power of the United States" Mar. 5, 1866	Agreement to Resolution Mar. 5, 1866
	Nay = Conservative	Yea = Radical	Nay = Radical	Nay = Radical	Yea = Radical	Yea = Radical	Yea = Conservative	Nay = Radical	Nay = Extreme Position	Nay = Conservative	Yea = Conservative	Nay = Extreme Position
Johnson	C	NV	NV	C	C	NV	C	C	M	C	C	X
Harris	R	C	C	C	C	C	C	C	X	C	C	M
Fessenden	R	C	NV	C	R	NV	R	R	M	R	C	M
Grimes	R	C	C	NV	C	NV	NV	NV	NV	R	R	M
Williams	R	C	C	C	R	C	R	C	M	R	R	M
Howard	R	R	C	R	R	R	NV	NV	NV	NV	NV	NV

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